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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Edward J. Rosewell, Treasurer of Cook County, Illinois, and Thomas M. Tully*, former Assessor of Cook County, Illinois, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 24, 1979.

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* Thomas M. Tully held the office of Assessor of Cook County on the date the complaint was filed. He has been succeeded in office by Thomas C. Hynes, who was duly elected Assessor of Cook County in November of 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 604 F.2d 530 (7th Cir. 1979), and appears herein as Appendix A. The memorandum order of the District Court is not reported, and appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1979. A timely petition for rehearing *en banc* was denied on October 30, 1979.* That order appears herein as Appendix C. This petition was filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the remedies which may be had by a real estate taxpayer in the courts of Illinois, including a state civil rights action premised on 42 U.S.C. § 1983, or a statutory refund without interest, are "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341 so as to bar federal injunctive relief from alleged overassessment which is claimed to violate the taxpayer's civil rights.

* The order of October 30, 1979 notes that "Judges Pell, Sprecher, Bauer and Wood voted to grant the suggestion for rehearing *in banc*." The active judges of the Seventh Circuit thus split 5 to 4 on the *en banc* suggestion.

FEDERAL STATUTES PROVIDE IN PERTINENT PART

Title 28 U.S.C.

§ 1341. Taxes by States:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42 U.S.C.

§ 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents the question whether two facets of Illinois' judicial remedies available to taxpayers who desire to contest their taxes square with the federal Anti-Tax Injunction Statute. The taxpayer maintains that the state statutory legal remedy, which is available and usually followed in the situation involved herein, is not "plain, speedy and efficient" because pre-judgment* interest is not paid on refunds received in the state court. The taxpayer has also contested the efficiency of a state court action based on 42 U.S.C. § 1983 to remedy the alleged overassessment of the property. The Seventh Circuit agreed with these arguments and held that injunctive relief was appropriate.

The case is presented on the pleadings only, since the district court granted the petitioners' motion to dismiss. The well pleaded allegations of the complaint thus form the factual basis for the determination of the issues raised herein. *Walker Process Equipment Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-75 (1965).

The taxpayer alleges that it is the titleholder of real property which was allegedly overassessed by the Cook County Assessor for tax year 1977; that its property was assessed at over three times the amount that property in its class should have been assessed; and that the taxes claimed by the Collector are also over three times the proper amount.

The taxpayer asserted that its only remedy in the state court was by way of payment under protest of the

* "Pre-judgment interest" as used in this petition means interest upon tax refunds computed from the time of payment to the time of the entry of the order of refund.

full amount of tax claimed by the Collector, and thereafter objecting at the Collector's annual Application for Judgment. (Sections 194 and 235 of the Revenue Act; Ill. Rev. Stat. 1977, ch. 120, sec. 675 and 716). The taxpayer alleges that the "customary delay in receiving refunds upon successful prosecution of such a suit is two years, and that the courts of Illinois do not award interest to taxpayers who successfully follow the aforesaid statutory remedy at law. The taxpayer sought a preliminary and permanent injunction preventing the Collector from taking any action to collect taxes in excess of the proper amount.

The tax officials filed a motion to dismiss on November 3, 1978, requesting the District Court to dismiss the Complaint on the basis of 28 U.S.C. § 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

On November 30, 1978, the District Court dismissed the Complaint for want of jurisdiction. The District Court stated:

1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a 'plain, speedy and efficient' remedy. *Tully v. Griffin*, 429 U.S. 68 (1976).
2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not 'plain, speedy and efficient'.

The District Court did, however, grant the taxpayer an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

The Seventh Circuit unequivocally held that the remedies available to a taxpayer under Illinois' statutes and cases* do not square with the requirement of the Federal Anti-Tax Injunction Act, 28 U.S.C. § 1341, that they be plain, speedy and efficient.

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* Illinois provides at least the following remedies to a taxpayer whose real estate is overassessed:

1. Administrative, pre-assessment—The assessor cannot increase a real estate assessment in a non-quadrennial year without first giving the taxpayer notice of such proposed increase and the right to be heard thereon. See Ch. 120, par. 578, 579, Ill. Rev. Stat. 1977; *Goodfriend v. Board of Appeals*, 18 Ill. App. 3d 412, 305 N.E.2d 404 (1st Dist. 1973).

2. Administrative post-assessment—The assessor has discretion upon application by the taxpayer to offer a certificate of error in certain situations. See Ch. 120, par. 604, Ill. Rev. Stat. 1977.

3. Administrative-assessment review—Prior to issuance of the tax bills, the Board of Appeals of Cook County has statutory power to review assessments and order them corrected. See Ch. 120, pars. 594, 598, Ill. Rev. Stat. 1977; *People ex rel. Korzen v. Fulton Market Cold Storage*, 62 Ill. 2d 443, 343 N.E.2d 450 (1976).

4. Statutory legal remedy—With payment under protest and exhaustion of administrative remedies, a taxpayer may file an objection to the collector's application for judgment and sale of delinquent real estate. The circuit court possesses the power in this proceeding to determine whether the assessment is correct. See Ch. 120, pars. 675, 716, Ill. Rev. Stat. 1977; *LaSalle National Bank v. County of Cook*, 57 Ill. 2d 318, 312 N.E.2d 252 (1974).

5. Injunctive Relief—A taxpayer may obtain injunctive relief when the legal remedy is unavailable. *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973); *28 East Jackson Enterprises v. Cullerton*, 523 F.2d 439 (7th Cir. 1975); *cert. denied*, 423 U.S. 1073 (1976). Supplemental Opinion upon Denial of Rehearing, 551 F.2d 1093 (7th Cir. 1976), *cert. denied*, 434 U.S. 835 (1977).

6. The remedies available to a taxpayer in Illinois include a 42 U.S.C. § 1983 claim. The Illinois Appellate court for the District in which the taxpayer's property is located has stated that, ". . . the courts of the State of Illinois have concurrent jurisdiction with the Federal courts to hear claims founded upon alleged violations of 42 U.S.C. § 1983." *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295, 323 N.E.2d 110 (1st Dist. 1974).

In particular the Seventh Circuit has focused upon (1) the failure of the prepayment remedy of the Illinois Revenue Act of 1939, Ch. 120, pars. 675, 716 to provide for the payment of interest upon refunds of successfully protested taxes, and (2) the question of whether the admitted availability of Illinois courts for a § 1983 action bars jurisdiction under 28 U.S.C. § 1341. The Court of Appeals stated:

> Our review of the respective legislative histories of the Tax Injunction Act and section 1983 leads to the conclusion that Congress did not intend that the possibility of bringing a section 1983 action in state court would bar, pursuant to the Tax Injunction Act, federal jurisdiction over a section 1983 action brought in federal court. Further, we have concluded that there is no legal or equitable remedy available under Illinois law which is "plain, speedy and efficient."

LaSalle, 604 F.2d at 540.

It thus follows from this ruling that any and every Illinois taxpayer desirous of litigating tax assessments may choose to bring his case in the District Court for an injunction against the collection of the tax. This state of affairs, though seldom arising, nonetheless presents grave difficulties in the relationship between the state and federal courts. Both the Supreme Court of Illinois and this Court have held the use of injunctive power in the area of state tax collection to be extremely sensitive.

In *Chicago, Burlington and Quincy Railroad Co. v. Frary*, 22 Ill. 34 (1859), affirming the denial of a tax injunction, the Supreme Court of Illinois observed:

> Let us now, by sustaining this bill stretch out the strong arm of this court and stay the hand of the collector in every case where any irregularity can be shown in the assessment of the revenue, and a flood of injunctions would be spread over the land

> at once, State and County revenue would cease to be collected, at least till termination of protracted litigation, and the wheels of government would stop. (22 Ill. at 36.)

The concern expressed by the court in *Frary* has led to ". . . procedures for mass assessment and collection of . . . taxes and for administration and adjudication of taxpayers' disputes with tax officials (which) are generally complex and necessarily designed to operate according to established rules . . . of state procedure." *Perez v. Ledesma*, 401 U.S. 82, 127-128, n. 17, Brennan, J., concurring (1971).

In the different, though highly relevant, context of the income tax, this Court stated that, "(T)axes are the life blood of government, and their prompt and certain availability an imperious need". *Bull v. United States*, 295 U.S. 247, 259 (1935).

This Court has noted the sensitive nature of federal tax injunctions and has observed that:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations require that such relief should be denied in every case where the asserted federal right may be preserved without it.

Matthews v. Rogers, 284 U.S. 521, 525-526 (1932); see also *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

The petitioners respectfully submit that the serious potential impact of the Seventh Circuit's opinion upon the collection of real estate taxes in Illinois, standing alone, warrants review by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS THAT AN AVAILABLE CONCURRENT STATE COURT § 1983 ACTION FAILS TO PROVIDE A STATE REMEDY ACCEPTABLE UNDER 28 U.S.C. § 1341 IS IN CONFLICT WITH THIS COURT'S HOLDING IN *TULLY v. GRIFFIN, INC.*, 429 U.S. 68 (1976), AND RAISES SIGNIFICANT, DISPUTED AND FUNDAMENTAL QUESTIONS REGARDING THE DISTRIBUTION OF JUDICIAL POWER BETWEEN STATE AND FEDERAL COURTS.

> A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue *except in cases where an asserted federal right might otherwise be lost.*

Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976).

The "asserted federal right" which the taxpayer seeks to vindicate by its complaint in federal court is based upon the Civil Rights Act, 42 U.S.C. § 1983. The taxpayer asserts that the assessment was intentionally excessive, and that its right to equal protection is therefore violated. Thus, the taxpayer contends, a federal injunction should issue against petitioners' attempts to collect the tax.

On the other hand the tax authorities, your petitioners, have at stake the following concerns: First, tax injunctions directly stem the flow of necessary revenue and thus constitute a direct threat to the fiscal interests of the state. See *Chicago, Burlington and Quincy Railroad Co. v. Frary*, 22 Ill. 34, 36 (1859); *Matthews v. Rogers*, 284 U.S. 521, 525-526 (1932); cf. *Bull v. United States*, 295 U.S. 247, 259 (1935). Secondly, tax injunc-

tions always transfer the risk of taxpayer insolvency to the government.*

In order to protect these competing interests this Court, prior to the adoption of § 1341, and Congress thereafter, has limited federal jurisdiction in tax cases to those where ". . . an asserted federal right might otherwise be lost." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

Illinois law is clear that civil rights actions filed pursuant to 42 U.S.C. § 1983 may be maintained in Illinois

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* A notorious example of this phenomenon exists here in the Seventh Circuit with regard to a downtown Chicago property located at 28 East Jackson Street. As described by Mr. Justice Downing in *28 East Jackson Enterprises v. Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978) 380 N.E.2d 395, a taxpayer employed:

> [a] series of cases in both the State and Federal courts by which plaintiff has avoided entirely the payment of real estate taxes on the subject property since 1971. The history of plaintiff's legal maneuvers is set forth in *28 East Jackson Enterprises, Inc. v. Rosewell* (1976), 65 Ill. 2d 420, 358 N.E.2d 1139, in *28 East Jackson Enterprises, Inc. v. Cullerton* (7th Cir. 1975), 523 F.2d 439, and in *28 East Jackson Enterprises, Inc. v. Cullerton* (7th Cir. 1977), 551 F.2d 1093, and will not be repeated here.
>
> It is sufficient here to say that these maneuvers suggest a pattern whereby plaintiff has taken advantage of an unresolved question of Illinois law, a gray area of Federal-State relations, and the delays inherent in the judicial process to delay the sale of its tax-delinquent property until after the following year's taxes have also become delinquent, after which a new suit is filed raising the same precise issues and beginning the process anew.

28 E. Jackson, supra 63 Ill. App. 3d at 881-82.

Having delayed the payment of more than $700,000 in real estate taxes for more than eight years, the taxpayer filed for a reorganization under Chapter 11 of the Bankruptcy Act in late 1979. See, *In the Matter of 28 East Jackson Enterprises, Inc., Debtor.* 79 B 39051, United States Bankruptcy Court, Northern District of Illinois, Eastern Division.

courts. *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295 (1st Dist. 1974), 323 N.E.2d 110; *Bohacs v. Ried*, 63 Ill. App. 3d 477, 481-82 (2nd Dist. 1978), 379 N.E.2d 1372. *Alberty* is settled law in the First Appellate District of Illinois, and is binding upon the Circuit Court of Cook County, Illinois, the state forum which would have venue and jurisdiction of a state § 1983 tax action in this case. These holdings are in accord with the emerging majority view on this question. See *Advertiser Co. v. Wallace*, 446 F. Supp. 677, 681 (N.D. Ala. 1978); *Green v. Klinkofe*, 422 F. Supp. 1021, 1026-27 (N.D. Ind. 1976); *Long v. District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972); *Terry v. Kolski*, 78 Wis.2d 475, 254 N.E.2d 704 (1977). The only case cited by the Seventh Circuit which holds to the contrary is *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). However *Chamberlain* was specifically discussed, considered, and rejected in *Alberty, supra* at 25 Ill. App. 3d at 295.

Furthermore, *Alberty* and *Bohacs* find sound support in the early concurrent remedy cases of *Claflin v. Houseman*, 93 U.S. 130 (1876) and *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 25-27 (1820). *Claflin* was no stranger to Illinois courts and, in fact, was cited as authority in *McLean v. St. John*, 10 Ill. App. 367, 368 (4th Dist. 1882) on the issue of concurrent jurisdiction in a bankruptcy matter.

The petitioners respectfully submit that the availability of Illinois courts for § 1983 actions as expressed in *Alberty* operates to preserve all federal rights which could be premised on the civil rights act. Under *Tully*, the federal court had a duty to ". . . refrain from interfering with [a state's] collection of its revenue." *Tully v. Griffin, supra* at 74. [parenthetical insert for clarity]

Despite the force and clarity of the *Tully* holding, and the full availability of a state civil rights action, the Seventh Circuit nonetheless dropped the bar of § 1341. The opinion, in effect, established a special rule for § 1983 tax actions which operates to preserve federal jurisdiction even though a clear forum in the state court exists to adjudicate exactly the same claim advanced in the federal district court. Thus, the court's opinion ignores the willingness of Illinois to afford its citizens a state forum for reviewing § 1983 claims, and describes the clear application of § 1341 as a "perverse result." 604 F.2d at 540.

The result is "perverse" only if one indulges in a value judgment in favor of the federal courts hearing § 1983 tax cases and against state involvement in them. However, it is the place of Congress to make such value judgments,* and it did so by passing § 1341 which is a clearly articulated limitation upon federal jurisdiction of § 1983 actions involving state taxes.

The Court of Appeals urges that the tax officials' position is impractical and ". . . undermines judicial efficiency and legal expertise". 604 F.2d at 538-39. Petitioners submit that the obvious influx of § 1983 tax injunction cases which the panel opinion invites** cannot much help the efficiency of the district judge, whose substantial expertise is not generally considered to include state tax overvaluation claims.

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* Mr. Justice Frankfurter cautions as follows: "We must be wary against interpolating our own notions of policy in the interstices of legislative provisions." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942).

** More than 1100 specific valuation objections are filed each year in Cook County alone.

Petitioners urge a case which presents a classic converse-Erie situation. See Hill, *Substance and Procedure in State FELA Actions—the Converse of the Erie Problem*, 17 Ohio St. L.J. 384 (1956); Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1560-61 (1960). In a diversity case the federal court decides state claims based upon state law. Under *Alberty* the state court decides federal claims based on federal law. The former situation is impelled by the statute authorizing federal jurisdiction, the latter by express congressional limitations thereon, all in accord with prime considerations of comity and federalism. The petitioners submit there is nothing impractical in deciding the case in a manner which preserves the fiscal integrity of the state.

The petitioners submit that the Court of Appeals' refusal to accept the clear mandate of *Tully* stems first from the court's distaste for the resulting limitation of federal jurisdiction in tax cases which the court found to be ". . . an untenable conclusion: the Tax Injunction Act would bar federal jurisdiction in all cases involving state tax operations—without exception." 604 F.2d at 538. However the court's resolution of the issue, while rhetorically appealing, completely begs the question. As long as state remedies are "plain, speedy and efficient" as we contend a state § 1983 action would be*, then

* While the Court of Appeals found that an Illinois § 1983 remedy was not plain because of uncertainty as to the law applicable, that concern is illusory. 604 F.2d at 537-38. Illinois Courts possess the full panoply of injunctive powers necessary to protect federal constitutional rights. Indeed, the Seventh Circuit noted in *Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817 (7th Cir. 1978) that "Illinois courts are not adverse to hearing constitutional challenges similar to Huber's complaints with Rule 2-4 [due process challenge]." *Huber, supra* at 821 [parenthetical insert for clarity]. See also *Coon v. Teasdale*,

(Footnote continued on following page)

§ 1341 would bar federal jurisdiction, without exception, even under the existing law of the Circuit. See *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F.2d 439 (7th Cir. 1975).

Secondly the Court of Appeals' decision appears to be based upon a fundamental distrust of the state court as an appropriate forum for the vindication of federal constitutional rights in tax cases. 604 F.2d 539-40; compare *Stone v. Powell*, 428 U.S. 465, 493-94 n. 35 with *Juidice v. Vail*, 430 U.S. 327, 342-346, Brennan, J., dissenting, and Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). However if the Anti-Tax Injunction Statute means anything, it must mean that Congress has unambiguously decided to commit those federal rights to the courts of the several states for adjudication.

The foregoing questions are of significant and fundamental import to both federal and state courts. Review by certiorari is most appropriate to resolve these questions in a manner supportive of the federalism upon which this nation's body politic is based.

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* *continued*
567 F.2d 820, 822 (8th Cir. 1977). The only "uncertainty" that exists in this case, results from the taxpayer's failure to submit its federal claims to the state court for determination. See, e.g., *28 East Jackson, Inc. v. Rosewell*, 65 Ill. 2d 420, 358 N.E.2d 1139 (1976); *28 East Jackson Enterprises, Inc. v. Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978), 380 N.E.2d 395.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE HOLDING OF THE FIFTH CIRCUIT IN *BLAND v. McHANN*, 463 F.2d 21 (5th CIR. 1972) UPON THE QUESTION WHETHER FAILURE OF A STATE STATUTORY REFUND SCHEME TO PROVIDE FOR PRE-JUDGMENT INTEREST RENDERS THE STATE REMEDY NOT PLAIN, SPEEDY AND EFFICIENT WITHIN THE MEANING OF 28 U.S.C. § 1341.

The question whether a state's tax refund remedy must include pre-judgment interest is an open one which this Court did not reach in *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). Subsequently the Fifth Circuit in *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972) held that a Mississippi remedy which ". . . makes no provision for the recovery of interest on illegally assessed taxes. . . ." (463 F.2d at 28 n. 24) nonetheless squares with the requirements of the Anti-Tax Injunction Act.

The conflict between *Bland* and *LaSalle* is clear. Petitioners submit that the Seventh Circuit has mistakenly elevated pre-judgment "interest" on tax refunds to a right or entitlement.*

However the law is clear that interest is a matter of statute, not of right as demonstrated by *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401 (W.D. Okla. 1934); *United States v. Board of County Commissioners of Pawnee*

* *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1021 (7th Cir. 1978) treats "interest" as an element of damages resulting from an overassessment in violation of a taxpayer's civil rights. 582 F.2d at 1080. No authority is advanced to support that conclusion, nor does the court distinguish between the pre-judgment or post-judgment nature of interest.

County, Oklahoma, 13 F. Supp. 641 (N.D. Okla. 1936); and *Bertelsen & Petersen Engineering Co. v. United States*, 60 F.2d 745 (1st Cir. 1932). In the *Comanche County* case the court held that a taxpayer who was entitled to a refund of local real estate taxes paid, was not entitled to interest from the local tax collecting authority. The court stated:

> "On the question of interest, the court appreciates the position of the defendant. Where taxes are paid, under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest from some other fund whose application had been provided by statute." (6 F. Supp. at 413.)

And in *Bertelsen*, the First Circuit in holding that interest on federal income refunds could be awarded only if a statute so provided, stated:

> ". . . Interest against the government is only allowable as provided by statute, *Angarica v. Bayard*, 127 U.S. 251, 260, 8 S. Ct. 1156, 32 L. Ed. 159; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 49 S. Ct. 52, 73 L. Ed. 170. There is no fixed right to it. It depends on the law at the time when the claim is allowed by the department, or, if the claim is litigated, when the case is heard by the court. *Hind v. United States*, 41 F.2d 892 (Ct. Cl.)." (60 F.2d at 748.)

See also this Court's holding in *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939).

However the Seventh Circuit was not persuaded by *Bland*, and after discussing several cases cited by the plaintiff, some of which the opinion concedes to be inapposite, (604 F.2d at 534 n. 7) others decided before the passage of § 1341, held that the ". . . economics of dis-

pute resolution . . ." favor a rule that interest ought to be paid on Illinois tax refunds in order for the system to be considered adequate.

The premise for this rule is derived from *Georgia R.R. v. Redwine*, 342 U.S. 299 (1952), a case dealing with attempts to tax a state-chartered railway company. The opinion overlooks the distinction that in *Redwine* the question was whether, in view of the federal contract clause protection afforded the railroad, a state remedy which forbade an injunction was adequate under § 1341. The Supreme Court of the United States held it was not, and observed that the alternative, filing for refunds in each county in which the railroad was taxed, did not present an adequate remedy.

The application of *Redwine*, and its underlying basis as perceived by the panel opinion, is inappropriate here because the plaintiff does not allege that the real estate tax is levied without authority or upon exempt property.

Illinois has always, unlike Georgia in *Redwine*, allowed injunctions to issue if a taxpayer can show that his property is exempt or that the tax, as in *Redwine*, is unauthorized by law: See *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973); *Dee-El Garage v. Korzen*, 53 Ill. 2d 1, 289 N.E.2d 431 (1972); *Nabisco, Inc. v. Korzen*, 68 Ill. 2d 451, 454, 369 N.E.2d 829 (1977), appeal dismissed 435 U.S. 1005 (1978). Of course, it makes sense to allow the statutory and constitutional authorization of a tax to be litigated in one proceeding.

However, the taxpayer's claim herein is premised upon overassessment, not lack of statutory authority. Therefore the panel opinion's reliance upon *Redwine* is misplaced.

The petitioners suggest that § 1341 does not require Illinois to present the "best" remedy, but rather one that is plain, speedy and efficient. See *Miller v. Bauer*, 517 F.2d 27, 32 (7th Cir. 1975); *Bland v. McHann, supra*, at 29. Given the complexities of local real estate tax evaluation cases, the petitioners submit that the present remedy squared with § 1341.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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January 25, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 78-2594

LASALLE NATIONAL BANK, Trustee under Trust No. 44891,

Plaintiff-Appellant,

v.

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-3746—**Nicholas J. Bua**, *Judge.*

ARGUED APRIL 25, 1979—DECIDED AUGUST 24, 1979

Before SWYGERT, *Circuit Judge,* MOORE, *Senior Circuit Judge,** and TONE, *Circuit Judge.*

SWYGERT, *Circuit Judge.* This appeal involves the Federal Tax Injunction Act and its construction with section 1983 of the Civil Rights Act. Plaintiff-appellant LaSalle National Bank[1] brought this civil

* The Honorable Leonard P. Moore, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

[1] Although LaSalle National Bank, as trustee under land trust No. 44891, is the named plaintiff-appellant, Patricia Cook, as sole beneficiary under the trust, is the real party in interest.

rights injunction action under 42 U.S.C. § 1983 against Edward J. Rosewell, Treasurer of Cook County and Thomas M. Tully, Assessor of Cook County. The action sought to enjoin the collection of excessive real estate taxes for 1977 allegedly imposed in violation of plaintiff's due process and equal protection rights under the Fourteenth Amendment. The sole issue on appeal is whether federal district court jurisdiction over this action is barred by the Tax Injunction Act of 1937. 28 U.S.C. § 1341. We conclude that jurisdiction is not barred and reverse the judgment of the district court.

I.

Plaintiff is the owner of a twenty-two unit apartment building in the all black, economically depressed community of East Chicago Heights in Cook County, Illinois.[2] On January 1, 1977 this property had a fair cash value of $46,000. According to Illinois statute, the property should have been assessed at 33% of its fair cash value: approximately $15,000. Nevertheless, the assessor assessed the property at $52,150, more than triple the correct assessment. As a result plaintiff's tax bill was $6,106 rather than $1,775. This bill was over three times the amount plaintiff would have been required to pay if she had been taxed at the correct rate.

Plaintiff alleges that the assessor knowingly as official policy or as governmental custom has maintained a system of assessment in Cook County which has produced egregious disparities in the ratio between the assessed valuation and the fair cash value of real property. The complaint further alleges that these overassessments are greater in frequency and size in older communities in which property is owned and inhabited primarily by members of racial minority groups and the economically disadvantaged.

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[2] For purposes of this appeal, the factual allegations of plaintiff's complaint are assumed to be true. *See* e.g. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); Fed.R.Civ.P. 12(b)(1).

In 1977, as well as in each of the preceding three years (in which plaintiff's property similarly was overassessed), plaintiff sought administrative relief from the Board of Tax Appeals of Cook County. In each of those years, the Board referred plaintiff's complaint to the assessor for recommendation, and in each year the assessor recommended "no change" in the assessment. The Board denied plaintiff's petition for administrative relief each year.

Having been denied administrative relief, plaintiff's only remedy at law was to pay the full amount of the tax claimed by the county collector (defendant Rosewell, Treasurer of Cook County) pursuant to the assessor's assessment, and thereafter objecting and suing for refund at the collector's annual Application for Judgment in the Cook County Circuit Court. *See* Ill. Rev. Stat. 1971, ch. 120, §§ 675, 716. According to plaintiff, the customary delay in receiving refunds after a successful prosecution of a tax refund suit is two years. Further, under Illinois law, no interest may be paid to a successful claimant who has secured the refund of real estate taxes paid under protest.

Plaintiff pursued her legal remedy in 1974, 1975, and 1976 and ultimately received refunds for the three years in May, 1978. Plaintiff had been required to deposit payments for illegally exacted taxes in the approximate amounts of $4,600 for 1974, $3,650 for 1975, and $3,950 for 1976, for three, two and one years, respectively. At 8% interest (the average prime rate for the three-year period), plaintiff lost approximately $2,000 because of her inability to use money which ultimately was deemed to be rightfully hers. Plaintiff contends that approximately $4,300 of her 1977 tax bill of $6,106 is an illegal overcharge and that she would be forced to deposit the $4,300, with no possibility of receiving interest on a refund, along with her correct tax payment in order to seek legal redress.

Plaintiff has not paid her 1977 taxes. Instead, on September 19, 1978 she filed this action in federal district court to enjoin the county collector from listing, advertising, proceeding to judgment and order of sale,

or selling plaintiff's property as payment for any outstanding tax bill in excess of the amount she is legally required to pay. On November 3, 1978 defendants moved to dismiss the complaint on the grounds that it was barred by the Tax Injunction Act. 28 U.S.C. § 1341. The district court agreed with defendants and dismissed plaintiff's complaint on November 30, 1978.[3] This appeal followed.

II

The Tax Injunction Act mandates that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the court of such State." 28 U.S.C. § 1341. This command has been followed consistently. *See* e.g., *Tully v. Griffin*, 429 U.S. 68; *Huber Pontiac, Inc. v. Whitler*, No. 77-1975 (7th Cir. Sept. 19, 1978). The converse of this proposition, however, is equally true. As the legislative history of the Act clearly indicates, an action for injunctive relief brought in a federal district court "will not be withdrawn from the jurisdiction of the . . . court *except* where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State . . . ." S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937) (emphasis added).

Defendants contend that there are two legal avenues available to plaintiff which offer "plain, speedy and efficient" relief within the judicial system of Illinois. First,

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[3] The district court ruled:

> 1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a "plain, speedy and efficient" remedy. *Tully v. Griffin*, 429 U.S. 68 (1976).
>
> 2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not "plain, speedy and efficient."

LaSalle Nat'l Bank v. Rosewell, No. 78-3746 (N.D. Ill. Nov. 30, 1978). The district court, however, did grant plaintiff an injunction pending this appeal pursuant to Fed.R.Civ.P. 62(c).

defendants argue that the delay in payment and the failure to pay interest on refunds made pursuant to successful suits for tax refunds brought under Ill. Rev. Stat. 1977, ch. 120, §§ 675, 716, do not render this statutory remedy (paying the full amount of the tax bill and then suing for refund) inadequate.[4] Our disagreement with this position is developed in Part A of this opinion. Second, defendants suggest that plaintiff can redress any alleged grievances concerning her property tax assessment by filing a civil rights action under 42

[4] Federal equity practice prior to the passage of the Tax Injunction Act of 1937 refrained from exercising jurisdiction over actions challenging state tax systems as long as an "adequate" state remedy was available. There was some question whether enactment of the 1937 Act was meant to alter this standard. *See* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's, The Federal Courts & the Federal System*, 979 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler.*] There is nothing in the legislative history of the Act to suggest that such a change was contemplated by the Act's drafters or sponsors. The legislative history focuses entirely on the problems caused by injunctions issued by district courts exercising their diversity jurisdiction. *See* S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); H. Rep. No. 1503, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 1415-17 (1937). *See also Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1074-75 (7th Cir. 1978) *cert. den.* 99 S.Ct. 1033 (1979). *Garret v. Bamford*, 538 F.2d 63, 66-67 (3d Cir.) *cert. den.* 429 U.S. 977 (1976). And in *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943), the Supreme Court described the passage of the Tax Injunction Act as congressional confirmation of traditional federal equity practice. *Id.* at 298-99. *See also, Tully, supra*, 429 U.S. at 73. The Supreme Court has used the traditional standard and the statutory standard interchangeably, and so shall we. *See Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 605 (1951); *Hillsborough v. Cromwell*, 326 U.S. 620, 624, 626 (1946); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105-106 (1944). *See also* Wright, *Federal Courts* 217 (3d ed. 1976) [hereinafter cited as *Federal Courts*].

The substantive interchangeability of the two standards is important for more than the linguistic flexibility it makes possible. To the extent that the standards are the same, cases decided prior to the enactment of the 1937 Act remain instructive in defining the circumstances in which a federal court may or may not exercise jurisdiction over an injunction action involving a state tax system.

U.S.C. § 1983 in state court. The availability of this mode of relief, defendants argue, provides a "plain, speedy and efficient" remedy in the Illinois courts, thereby barring the equitable jurisdiction of the federal courts. Our analysis of this proposition and our conclusion that the availability of a section 1983 action in state court does not bar federal court jurisdiction comprise Part B of this opinion. We conclude that the Tax Injunction Act does not preclude federal jurisdiction over plaintiff's action, and thus the district court had and should have retained jurisdiction over plaintiff's prayer for relief.

A.

Under Illinois law, the only remedy available to a Cook County property taxpayer billed pursuant to an erroneous assessment is to pay the tax in full and then sue in the Cook County Circuit Court for a refund of the erroneously collected portion of the tax payment. A taxpayer who successfully sues and receives a refund is not entitled, according to Illinois law, to interest on the funds which erroneously had been collected by the County. *Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415 (1960). This rule was reiterated by the Illinois Supreme Court in *Clarendon Assoc. v. Korzen*, 56 Ill. 2d 95, 109 (1973):

> [U]nder the statutory remedy provided by sections 194 and 235 of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, ch. 120, pars. 675 and 716) the taxpayer is not entitled to interest on the refund. This court also held in *Lakefront* that this fact does not render the remedy at law inadequate so as to justify equity in assuming jurisdiction. We see no reason to depart from that decision.

See also, Neubert v. Foxworthy, No. 79-121, (Ill. App. 4th Div., April 25, 1979); *Vretsky v. Baschen*, 47 Ill. App. 3d 169 (1977).[5]

[5] The 81st Illinois General Assembly last session failed to enact HB 451 and HB 1317, bills introduced which would have required payment of interest on tax refunds.

The question we must answer is whether this remedy, which requires prepayment of the entire tax bill and refunds erroneously collected monies without interest (and allegedly with an average delay of two years), is "plain, speedy and efficient." The Supreme Court in *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) left undecided the question "whether omission to provide interest on a successful refund application renders the state remedy here an inadequate one within the meaning of § 1341." *See also, 28 East Jackson Enterprises v. Cullerton*, 523 F.2d 439, 441 n.4 (7th Cir. 1975) *rehearing denied*, 424 U.S. 959 (1976). There is no dispositive precedent on this issue. Our analysis of prior judicial decisions, however, indicates that the decisions which have considered the question most carefully have concluded that the failure to pay interest on a successful refund application makes the state remedy inadequate. Further, policy considerations, the legislative history of the Tax Injunction Act, and common sense all dictate the conclusion that the Illinois remedy is inadequate.

The court's opinion in *United States v. Livingston*, like other opinions since the passage of section 1341, observed that,

> It is well settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld. Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate.[6]

United States v. Livingston, 179 F.Supp. 9, 15 (E.D. S.C. 1959) (three-judge court) (citations omitted) aff'd per

[6] Numerous courts have held that uncertainty about the adequacy of a state court remedy is sufficient to lift the § 1341 bar on federal court jurisdiction over equitable actions regarding state tax systems. *See* e.g. *Tully, supra*, 429 U.S. at 76; *Hillsborough, supra*, 326 U.S. at 629; *28 East Jackson, supra*, 523 F.2d 439; *Garrett, supra*, 538 F.2d at 70. Thus, even if the *Lakefront* rule had not been so definitively and recently articulated, uncertainty about the award of interest to a successful claimant under the Illinois statutory remedy would be sufficient to render the remedy inadequate.

curiam, 364 U.S. 981 (1960). *See also, Mullaney v. Hess*, 189 F.2d 417, 420 (9th Cir. 1951); *United States v. Department of Revenue*, 191 F.Supp. 723, 727 (N.D. Ill.), vacated, 368 U.S. 30 (1961).[7] And numerous cases prior to the passage of the 1937 Act held that the failure to pay interest on a tax refund constituted an alternative, but independent basis for concluding that the state remedy was inadequate. *Educational Films Corp. v. Ward*, 282 U.S. 375 (1931); *Hopkins v. Southern Cal. Tel. Co.*, 275 U.S. 393, 399-400 (1928); *Nutt v. Ellerbe*, 56 F.2d 1058, 1062 (E.D. S.C. 1932) (three-judge court); *Proctor & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165, 166 (S.D. N.Y. 1924). As the Supreme Court concluded in *Educational Films*,

> The legal remedy . . . falls short of adequacy in at least two respects. [First] [r]efund, if any, is expressly without interest. § 219(d). *See Proctor & Gamble Distributing Co. v. Sherman*, 2 F.(2d) 165; *Southern California Telephone Co. v. Hopkins*, 13 F.(2d) 814, 820, aff'd 275 U.S. 393.

Educational Films, supra, 282 U.S. at 386 n.2.

Defendants cite a plethora of cases which they contend demonstrate that the failure to provide interest on a tax refund does not render a remedy inadequate. All of these cases are distinguishable from the problem raised by this appeal. Several of the cases analyzed the remedy provided by the state and, as defendants indicate, determined that it was adequate. *See Aluminum Co. of America v. Department of the Treasury*, 522 F.2d 1120

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[7] None of these cases ruled on the precise issue raised in this appeal. *Livingston* held that the failure to pay interest was "another reason" why § 1341 was inapplicable to the taxpayer's suit in that case. *Livingston, supra*, 179 F.Supp. at 13. *Mullaney*, after stating the legal principle, concluded that the remedy in question was adequate. And *Department of Revenue* concluded that the failure to pay interest to a successful claimant on the cost of a bond which had to be put up to pursue a remedy was analogous to the failure to pay interest on a tax refund, and, therefore, the remedy involving the bond was inadequate. Nevertheless, all of these cases lend substantial support to the conclusion that the failure to pay interest, alone, renders a remedy inadequate.

(6th Cir. 1975); *Group Assisting Sewer Proposal-Ansonia v. City of Ansonia*, 448 F.Supp. 45 (D.Conn. 1978); *Abernathy v. Carpenter*, 208 F.Supp. 793 (W.D. Mo. 1962), *aff'd* 373 U.S. 241 (1963). But in each of these decisions the adequacy of the state remedy was based, in part, either on the availability of interest on refunds, *Aluminum Co., supra*, 552 F.2d at 1127-28; *Group Assisting, supra*, 448 F.Supp. at 47, or on the fact that prepayment of the contested tax was not required. *Abernathy, supra*, 208 F.Supp. at 796-97.[8] And in the other cases upholding the adequacy of a state remedy cited by defendants, the relationship of nonpayment of interest to the adequacy of the state remedy apparently never was raised by the litigants and certainly never was expressly considered by the courts. *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939); *Stratton v. St. Louis Southwestern Ry.*, 284 U.S. 530 (1932); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Bertelsen & Petersen Eng'r Co. v. United States*, 60 F.2d 745 (1st Cir. 1932); *United States v. Board of County Comm'rs*, 13 F.Supp. 641 (N.D. Okla. 1936); *United States v. Board of Comm'rs*, 6 F.Supp. 401 (W.D. Okla. 1934).[9] Thus none of these cases provides persuasive support for defendants' position.

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[8] The decisions in *Group Assisting* and *Abernathy* also are based, in the alternative, on the inconsequential amounts of money involved if interest were not recoverable on a contested tax payment. We do not decide the question whether a remedy is inadequate if it fails to provide for interest when the dollar amount in question is extremely small. We do note, however, that both the remedies considered in those cases provided for resolution of the dispute within a period of several weeks and the interest involved amounted to under $50.00. In the instant case, delays of two years are alleged and hundreds of dollars in lost interest are at stake for each year in which a wrongful assessment is made.

[9] In *Bland* the complaining taxpayer did object to the adequacy of the Mississippi remedy on the grounds, *inter alia*, that Mississippi law made "no provision for the recovery of interest on illegally assessed taxes," 463 F.2d at 28, n.24, but the court's opinion did not discuss this specific contention. And in *Stratton* which, like the other cases cited by defendants, did not address the relationship of the nonavailability of interest to the adequacy of the state remedy, the Court concluded:

(Footnote continued on following page)

The legislative history of the Tax Injunction Act similarly lends little support to defendant's contention that the failure to pay interest on tax refunds does not affect the adequacy of the state remedy. The two purposes of the Act, as described in the legislative history, were, first, to eliminate discrimination between state citizens who were required to pursue relief regarding illegal tax assessments in the state court and foreign corporations operating in the state which were able to sue under the diversity jurisdiction of the federal courts and, second, to prevent these foreign corporations, which frequently refused to pay their large state taxes and then initiated dilatory and expensive legal actions in the federal courts, from paralyzing state fiscal operations. S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 1415-17 (1937). See also, *Garrett, supra*, 538 F.2d at 72; *Tramel v. Schrader*, 505 F.2d 1310, 1315-16 (5th Cir. 1975). Neither of these purposes conflicts with the rule suggested by federal cases decided prior to 1937 that the failure to provide for interest makes a tax refund remedy inadequate. See, *supra*, p. 8.

Perhaps even more importantly, the express principle underlying both of these congressional goals was that justice is best served by the speedy judicial resolution of tax disputes. Foreign corporations had been able to secure financial benefits for themselves by delaying tax collection through federal court litigation; state governments often were forced to accept ungenerous out-of-court settlements in order to secure sorely needed tax revenues. The Tax Injunction Act was a response to the "needs of many States for a more prompt disposition of tax controversies . . . ." S. Rep., *supra*, at 3. And excerpts from Congressional hearings regarding the Johnson Act of 1934, 28 U.S.C. § 1342, inserted into the Con-

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[9] *continued*

> There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it *in the absence of allegations setting up special circumstances which would render the legal remedy inadequate.*

284 U.S. at 534 (citations omitted) (emphasis added).

gressional Record in support of the Tax Injunction Act (often compared during its enactment process to the Johnson Act), decried the financial hardships imposed on a litigant drawn into federal court who is often unable to pursue his claim to a final judicial resolution. 81 Cong. Rec. 1415, 1417 (1937). The Illinois tax grievance remedy, which forbids the recovery of interest and allegedly involves a two year delay prior to refund payment, gives a financial incentive to one of the parties (the County) to delay dispute resolution and imposes severe financial hardships on private parties seeking to redress their grievances. Although the roles have been reversed, the available Illinois remedy exacerbates much the same evils as the Tax Injunction Act was designed to eliminate. *See generally Garrett, supra,* 538 F.2d at 72. It is unlikely that the drafters of the 1937 Act would have considered the Illinois statutory remedy "plain, speedy and efficient."

This concern with the economics of dispute resolution was reflected in the Supreme Court's decision in *Georgia R.R. v. Redwine,* 342 U.S. 299 (1952). In *Redwine,* one of the state remedies available to the aggrieved taxpayer required filing over three hundred separate claims in fourteen different counties in order to achieve full redress. And so while redress theoretically was possible in the state courts, the remedy's diseconomies rendered it inadequate. *Id.* at 303. *See also, 28 East Jackson, supra,* 523 F.2d at 441 (state remedy requiring full payment of tax not "available" when petitioner did not have and could not borrow sufficient funds to pay the full tax); *Federal Courts, supra,* at 217. Under present Illinois law, as under Georgia law in *Redwine,* relief is possible, but it imposes undue costs on taxpayers seeking redress. Under these circumstances, the state remedy is inadequate.

The most succinct analysis of the inadequacy of a tax grievance procedure which requires prepayment of the entire tax and then refuses to pay interest on the refunds awarded successful litigants was provided by Learned Hand over fifty years ago:

> [I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Proctor & Gamble, supra, 2 F.2d at 166. We agree with the conclusion of the court in *United States v. Livingston,* that

> [A state] may allow interest upon refunds of taxes or not as she chooses. If she does not make clear the existence of the right to recover such interest, however, she necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statutes.

179 F.Supp. at 15. The failure to pay interest on refunds to taxpayers who successfully challenge their tax assessment pursuant to the Illinois statutory procedures renders that remedy inadequate. Thus, the availability of this remedy in the state courts does not bar federal jurisdiction over injunction actions brought by aggrieved Cook County taxpayers.

B.

Defendants also contend that plaintiff has a "plain, speedy and efficient remedy" in the state courts because she can challenge her allegedly discriminatory tax assessment by bringing an action pursuant to 42 U.S.C. § 1983 in an Illinois court.[10] We do not agree with defen-

[10] Defendants cite several federal district court decisions which have held, at least in the alternative, that the availabili-

(Footnote continued on following page)

dant's contention, and we hold that the availability of a section 1983 action in state court does not bar federal jurisdiction over a section 1983 action alleging constitutional deprivations arising from an illegal state tax exaction.

As a predicate to their contention that a section 1983 state court action bars federal jurisdiction in this case, defendants, citing two recent Illinois appellate cases, assert that state courts have jurisdiction to hear federal civil rights actions filed pursuant to 42 U.S.C. § 1983. *See Bohacs v. Reid*, 63 Ill. App.3d 477 (1978); *Alberty v. Daniel*, 25 Ill. App.3d 291 (1974). While this statement may well be true, it is by no means a settled rule of law.[11]

Similarly, plaintiff argues that an Illinois court adjudicating her section 1983 claim would be bound by the

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[10] *continued*
ty of a § 1983 action in state court constitutes an adequate remedy for an aggrieved taxpayer under § 1341, thereby precluding federal court jurisdiction over the taxpayer's complaint. *See Advertiser Co. v. Wallace*, 446 F.Supp. 677 (M.D. Ala. 1978); *Green v. Klinkofe*, 422 F.Supp. 1021 (N.D. Ind. 1976); *Horn v. O'Chesky*, 378 F.Supp. 1280 (D.N.M. 1974). None of these cases justifies its holding with any detailed analysis of the relationship between the two statutes. In addition, *Advertiser*, which held that a plaintiff seeking damages under § 1983 was barred from federal court by the Tax Injunction Act, is in direct conflict with our decision in *Fulton Market*, *supra*, 582 F.2d 1071.

[11] Most judicial decisions which have concluded that state courts can entertain § 1983 actions have reached their result with little analysis, relying on the general principle of concurrent jurisdiction. *See Long v. District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972); *Bohacs*, *supra*, 63 Ill. App.3d 477; *Alberty*, *supra*, 25 Ill. App.3d 291. *See generally*, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-27 (1820); Hamilton, *The Federalist Papers*, No. 82. But courts which more closely have examined the concerns underlying the adoption of the civil rights statute have been more hard-pressed to justify state court jurisdiction over § 1983 actions. *Compare Terry v. Kolski*, 254 N.W. 2d 704 (S.Ct. Wis. 1977) (state courts open to § 1983 actions) *with Terry*, *id.* at 713 *et seq.* (dissenting opinion) and *Chamberlain v. Brown*, 442 S.W.2d (S.Ct. Tenn. 1969) (no state jurisdiction for § 1983 actions).

rule of *Lakefront* that a taxpayer who has secured a refund cannot receive interest on that refund. *See, supra*, p. 6. Consequently, plaintiff contends that this definitive precedent in state law renders a state section 1983 remedy inadequate. Plaintiff's argument assumes that an Illinois court adjudicating a federal claim under section 1983 would be free to apply Illinois equity law, a proposition that is far from certain.[12] Nevertheless, we believe that the doubt whether an Illinois court would apply federal equity law instead of the Illinois rule against interest on tax refunds renders a remedy pursuant to a possible section 1983 action in the state court less than plain.

But independent of this uncertainty about the adequacy of the remedy, an exact reading of the Tax Injunction Act and strict attention to the principles underlying section 1983 compel the conclusion that the

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[12] In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Supreme Court held that in a state court action pursuant to 42 U.S.C. § 1982, questions regarding compensatory damages for the deprivation of a federal right are governed by federal standards under 42 U.S.C. § 1988. The Court also noted that a federal court can fashion an effective equitable remedy and that,

> That federal remedy for the protection of a federal right is available in the state court, if that court is empowered to grant injunctive relief, generally, as is the Virginia court. Va. Code Ann. § 8-610 (1957 Repl. Vol.).

Id. at 238.

Sullivan does not directly answer the question posed here: when state equitable law is at odds with federal law (as we have concluded it is here with regard to the adequacy of the Illinois refund remedy), which law would apply in a § 1983 action. While the inference from *Sullivan* is that federal law would apply, *see also Testa v. Katt*, 330 U.S. 386 (1947); *Ward v. Board of County Comm'rs (Love County)*, 253 U.S. 17 (1920); *General Oil Co. v. Grain*, 209 U.S. 211 (1908), that conclusion is not settled. *See generally, Fulton Market, supra*, 582 F.2d at 1080; *Hart & Wechsler, supra*, at 434-37, 521-24; Comment, *Racial Discrimination and the Tax Injunction Act*, 90 Harv. L. Rev. 616, 623-24 n.49 (1977); Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1556-61 (1960).

availability of a state court action under section 1983 does not bar federal jurisdiction. Reading the Tax Injunction Act to bar federal court jurisdiction on the basis of the possibility of bringing a federal cause of action under section 1983 in state court leads to an untenable conclusion: the Tax Injunction Act would bar federal jurisdiction in all cases involving state tax operations—without exception. Defendants' position assumes that state courts generally have concurrent jurisdiction over federal causes of actions, including section 1983, and that a state court hearing that federal claim would apply federal equity law (if the state court were free to apply state equity law then, in this case, interest would not be available as part of the remedy and the remedy would be inadequate). But if both these assumptions were true, there would be no class of cases that would escape the bar on federal court jurisdiction contained in the Tax Injunction Act. Whatever action could be brought in federal court, given inadequate state statutory and judicial remedies, also could be brought in state court under federal law pursuant to the state court's concurrent jurisdiction. *See generally, Iowa-DesMoines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *General Oil, supra*, 209 U.S. 211. Federal courts never would have jurisdiction over actions brought by taxpayers regarding illegal state tax assessments.

Although Congress possesses the power to legislate this result, there is no indication that the Tax Injunction Act was meant to do so.[13] The language of the Act on its face contemplates cases which will escape its jurisdictional proscription, and the explanations of the statute contained in its legislative history unmistakably corroborate this reading of the Act. *See supra* p. 4. *See also*

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[13] As the Fifth Circuit stated in *Tramel, supra*, 505 F.2d at 1326,

> Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly. *Cf. Phillips v. United States*, 1941, 312 U.S. 246, 251.

81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone).[14] There is no reason to conclude that defendants' reading of the Tax Injunction Act—a reading which would lead to a result clearly not contemplated by the drafters of the Act—is correct.

Defendants' position makes even less sense as a practical matter. In order to argue that a section 1983 action brought in an Illinois court constitutes an adequate remedy, defendants must presume that federal equity law applies. But then it is difficult to conceive of any significant state autonomy interest that is served by barring federal court jurisdiction. Defendants' position leads to the scenario of a state court adjudicating a cause of action and formulating a remedy—and throughout required to apply federal law. It would be difficult to say that this is less of an incursion into state autonomy than an action in federal court. And this result undermines judicial efficiency and legal expertise. It is unlikely that when Congress drafted the Tax Injunction Act it intended that all disputes in which state legal and equitable remedies were inadequate be resolved in state court under these conditions.

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[14] There is a suggestion implicit in the legislative history of the Act that it is only when a state legal or equitable remedy is available and adequate—not when there is a federal remedy which can be brought in state court—that the jurisdictional bar applies. The Act's sponsor explained that "specific provision is made that the suit will be taken out of the jurisdiction of the Federal court only if a plain, speedy, and efficient remedy may be had at law or in equity in the courts of the State." 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). Senator Bone also excerpted a portion of the Judiciary Committee Report on the Johnson Act and included it in the Congressional Record. He said the excerpt was "applicable to [the Tax Injunction Act] in the same manner that [it was] applicable to the Johnson Bill. *Id.* The excerpt described the archetype of the disputes meant to be excluded from federal court and added:

> And all the time in this dispute there is no Federal question involved. There is a dispute arising under a State statute or law of other origin and nothing more.

Id. at 1417. *See Garrett, supra*, 538 F.2d at 66-67.

Our conclusion that the possibility of bringing a section 1983 action in state court does not bar, pursuant to the Tax Injunction Act, federal jurisdiction over an action alleging that state taxes were exacted unconstitutionally, is corroborated by the principles and policies underlying 42 U.S.C. § 1983.[15] The sponsors, supporters and even the opponents of the predecessor of section 1983 likely would be shocked indeed if they were to learn that the possibility of bringing a section 1983 action in state court had barred a section 1983 plaintiff from federal court.

The Supreme Court in *Mitchum v. Foster*, 407 U.S. 225 (1972) observed:

> Section 1983 opened the federal courts to private citizens, offering *a uniquely federal remedy* against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

Id. at 239 (emphasis added). When Congress passed the predecessor of section 1983,

> [it] clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Id. at 242.[16] The failure of state courts to vindicate federal rights was one of the primary motivations for

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[15] This assumes, of course, that there is no adequate legal or equitable remedy at state law.

[16] The congressional legislation passed to effectuate the post-Civil War amendments gave the federal courts primary responsibility for vindicating the rights expressed in those amendments:

> [The federal courts supplanted] the state courts as the principal forum for enforcing federal law . . . .

(Footnote continued on following page)

passage of the predecessor of section 1983. *Id.* at 240-42. *See also,* Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875,* 13 Am. J. Legal Hist. 333, 338 (1969); *Developments, supra,* at 1142-50. The legislative history of the Act is replete with references to the inability and unwillingness of state courts to protect federal rights and, as a result, to the need to insure access to the federal courts. *See Mitchum, supra,* 407 U.S. at 241 n.31; *Developments, supra,* at 1154-55 nn.112, 114. As the Supreme Court stated in *Monroe v. Pape,* 362 U.S. 167, 180 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts . . . .

Defendants ask us to turn section 1983 on its head. If their argument were accepted, access to federal courts for the protection of Fourteenth Amendment rights would be denied because of the availability in state courts of "a uniquely federal remedy" which Congress enacted precisely because of the failure of state courts to protect federal rights. We do not embrace this perverse result. The legislative history of the statute compels our conclusion that the availability of a section 1983 action in state court does not bar federal jurisdiction over a section 1983 action brought in federal court to vindicate

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[16] *continued*

> This significant expansion of federal judicial power seems to reflect both the Republicans' belief that the judiciary was the most appropriate institution to effectuate their "moderate revolution" in civil rights and their increasing distrust of the willingness of state judges to enforce vigorously national laws or fulfill national policies. Rather than providing for a large-scale displacement of state police power by congressional regulation of intrastate affairs, the Republicans sought to create in the federal courts opportunities for litigants . . . to invoke the power of the national government to safeguard nationally secured liberties threatened by the action or inaction of the states.

Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1142, 1150 (1977) (citations omitted).

constitutional rights allegedly violated by an illegal state tax assessment.

Our review of the respective legislative histories of the Tax Injunction Act and section 1983 leads to the conclusion that Congress did not intend that the possibility of bringing a section 1983 action in state court would bar, pursuant to the Tax Injunction Act, federal jurisdiction over a section 1983 action brought in federal court, Further, we have concluded that there is no legal or equitable remedy available under Illinois law which is "plain, speedy and efficient."

For these reasons, we conclude that federal jurisdiction over plaintiff's suit was proper. The judgment of the district court is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LaSalle National Bank, Trustee under
Trust No. 44891,

Plaintiff,

No. 78 C 3746 vs.

Edward J. Rosewell, et al.,

Defendants.

Before Nicholas J. Bua, *Judge*
United States District Court

ORDER

This matter came on upon plaintiff's motion for a preliminary injunction and this court having considered the motion, the brief of plaintiff, the motion of defendants to dismiss and having heard the arguments of counsel, finds:

1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a "plain, speedy and efficient" remedy. *Tully* v. *Griffin,* 429 U.S. 68 (1976).

2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not "plain, speedy and efficient".

3. In order to maintain the status quo while plaintiff appeals from this Order, it is necessary that pursuant to Rule 62(c), Fed. R. Civ. Pro., an injunction pending appeal enter restraining the defendant Rosewell from proceeding to judgment and order of sale against the property,

Permanent Index No. 32 23 414 054, Volume 16, of the 1977 tax rolls and from selling said property in the matter of his annual application for judgment, etc., in the Circuit Court of Cook County.

(a) If such an injunction is not entered, the defendant will proceed to judgment against the property and the property will be sold at the annual tax sale unless the plaintiff redeems the property, with interest and penalties, thereby rendering it impossible for this or any other court to afford relief to plaintiff in the event it prevails upon appeal.

(b) The county will not suffer any damage by this injunction, since it will be entitled to full payment, plus interest, if this order is upheld.

(c) The public interest will not be harmed.

(d) There is a substantial likelihood that petitioner may prevail on appeal.

CONCLUSION

Under the provisions of 28 U.S.C. §1341 denying jurisdiction to this court in restraining the collection of state taxes when a plain, speedy, and efficient remedy exists in the state courts, this court has no jurisdiction of the subject matter of this complaint.

IT IS THEREFORE ORDERED that plaintiff's motion for a preliminary injunction is denied and that the complaint is dismissed for want of jurisdiction.

IT IS FURTHER ORDERED that pursuant to Rule 62(c), Fed. R. Civ. Pro., Edward J. Rosewell, defendant County Collector, is enjoined from proceeding to judgment and order of sale against Cook County property. Permanent Index No. 32 23 414 054, Volume 16, and from selling said property pending the appeal of this order to the United States Court of Appeals for the Seventh Circuit.

/s/ Nicholas J. Bua

United States District Judge

DATED: November 30, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 30, 1979

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. LEONARD P. MOORE, SR., *Circuit Judge*•
Hon. PHILIP W. TONE, *Circuit Judge*

LASALLE NATIONAL BANK, Trustee under Trust No. 44891,

Plaintiff-Appellant,

No. 78-2594 vs.

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-3746 — NICHOLAS J. BUA, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled

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• Honorable Leonard P. Moore, Senior Judge for the U.S. Court of Appeals for the Second Circuit is sitting by designation.

cause by counsel for the defendants-appellees, a vote of the active members of the Court was requested, and a majority of the active members of the Court has voted to deny a rehearing *in banc.*** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Judges Pell, Sprecher, Bauer and Wood voted to grant the suggestion for rehearing *in banc.*

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR CERTIORARI FILED JANUARY 26, 1980
CERTIORARI GRANTED MARCH 17, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

VS.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

APPENDIX

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Judgment of the Court of Appeals, filed August 24, 1979	Pet. App. A at 19a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 19, 1978—
Plaintiff's Complaint filed in the United States District Court for the Northern District of Illinois, Eastern Division.

November 3, 1978—
Defendants' Motion to Dismiss filed.

November 13, 1978—
Plaintiff filed Motion for Preliminary Injunction, with Affidavit of Patricia Cook.

November 30, 1978—
Order entered granting Defendants' Motion to Dismiss, and denying Plaintiff's Motion for Preliminary Injunction.

December 4, 1978—
Plaintiff-Appellant filed Notice of Appeal.

August 24, 1979—
Opinion and Judgment of the Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891, Plaintiff, vs. EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County, Defendants.	No. 78 C 3746

COMPLAINT

(Filed September 19, 1978)
(Appendices omitted)

LaSalle National Bank, Trustee under Trust No. 44891 of which Patricia Cook is the sole beneficiary, complains of Edward J. Rosewell, Treasurer and Ex-Officio County Collector of Cook County, and Thomas M. Tully, Assessor of Cook County:

The Parties

1. LaSalle National Bank, Trustee under Trust No. 44891, is a national bank with its office in Chicago. It is the owner of real property in the Village of East Chicago Heights, Illinois. Trust No. 44891 is an Illinois land trust. Patricia Cook, a black resident of Cook County, is the sole beneficial owner thereof, has so been at all times pertinent to these proceedings and is authorized under the terms of the indenture to bring

this action. She is the real party in interest and will be referred to as plaintiff throughout this Complaint.

2. Edward J. Rosewell is the Treasurer and ex-officio County Collector of Cook County. Pursuant to the provisions of the Revenue Act of 1939, as amended, Chapter 120 Illinois Revised Statutes §§ 482, *et seq.*, he has the duty to collect real estate taxes levied against property in Cook County. Thomas M. Tully is the Assessor of Cook County. Pursuant to the provisions of the Revenue Act and of the Illinois Constitution, Article IX § 4, he has the duty to assess for tax purposes all non-exempt real property in Cook County. Both officials held their respective offices at all times pertinent to this Complaint.

Jurisdiction

3. Jurisdiction lies under 28 U.S.C. § 1343(3), venue under 28 U.S.C. § 1391.

The Cause of Action

4. The cause of action arises out of a violation by defendants, acting under color of State law, of plaintiff's civil rights of due process guaranteed her by the 14th Amendment to the United States Constitution. It is based upon 42 U.S.C. § 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Plaintiff is the owner of a 22-apartment building at 1400 Lincoln Highway in the Village of East Chicago Heights described as:

> The West 89.33 feet of Lot 17 in Block 7 in Lincoln Woodlawn Gardens Subdivision of Part of North 1599 feet West ½ of the South East ¼ North and West of center line of Deer Creek Section 23, Township 35 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois.

The property is improved with an apartment building containing 22 efficiency type apartments, one of which serves as an office for the building. East Chicago Heights is an all Negro community in Thornton Township. It has the lowest median income and lowest median home value of any village or town in Cook County.

6. The property was purchased from the FSLIC in 1972 in an arms length sale for $45,000.00. On January 1, 1977, it had a fair cash value of $46,000.00, and was indexed, assessed and taxed as follows:

Permanent Number	Volume	Assessed Valuation	Equalized Valuation	Rate	Tax
32-23-414-054	16	52,150	73,808	8.274	$6,106.00

A copy of plaintiff's tax bill for 1977 is appended as Exhibit "A".

7. Article IX, Section 4 of the Illinois Constitution provides in pertinent part:

> "§ 4. Real Property Taxation
>
> (a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county."

8. On January 1, 1977, Chapter 120 Illinois Revised Statutes § 501a provided:

"501a. Classification under Constitution—Necessity for ordinance.) § 20a. Where real property is classified for purposes of taxation in accordance with Section 4 of Article IX of the Constitution and with such other limitations as may be prescribed by law, such classification must be established by ordinance of the county board. If not so established, the classification is void. Added by P.A. 78-700, § 1, eff. Jan. 1, 1974."

9. Since January 1, 1974, there has been in effect an ordinance in Cook County #COM 76815 of December 17, 1973, establishing a system of classifying real estate for the purposes of assessment for taxation which provides in pertinent part:

"Section 2. Real estate is divided into the following assessment classes:

Class 1: Unimproved real estate or real estate used as a farm.

Class 2: Real estate used for residential purposes when improved with a house, an apartment building of not more than six living units, or residential condomin-

ium, a residential co-operative or a government-subsidized housing project if required by statute to be assessed in the lowest assessment category.

Class 3: All improved real estate used for residential purposes which is not included in Class 2.

Class 4: Real estate owned and used by a not-for-profit corporation in furtherance of the purposes set forth in its charter unless used for residential purposes. If such real estate is used for residential purposes it shall be classified in the appropriate residential class.

Class 5: All real estate not included in any of the above four classes.

Section 3. The Assessor shall assess, and the Board of Appeals shall review assessments on, real estate in the various classes at the following percentages of market value:

Class 1:	—	22%
Class 2:	—	17%
Class 3:	—	33%
Class 4:	—	30%
Class 5:	—	40%"

10. Notwithstanding that plaintiff's property is in Class 3 and therefore was required to be assessed in 1977 at $15,180 or 33% of market (fair cash) value, it was nonetheless assessed by defendant Tully at $52,150 or at 113% thereof. In Cook County, property generally in Class 3 was assessed at 33% of market value in 1977. Plaintiff thus has a lien for taxes against her property (Chapter 120, Illinois Revised Statutes, § 697) for, and is required to pay, almost three and one-half times the taxes levied against property of the same class generally throughout the County.

11. Although required to assess all properties throughout the County uniformly within their respective classes, defendant Tully has knowingly as official policy or governmental custom maintained, adopted or promulgated policy statements, regulations, decisions and systems of assessment which have produced egregious disparities in assessments throughout the County. Disparities in over-assessment of which plaintiff complains are far greater in number and size in older, inner city and county areas, owned, inhabited or used to a larger extent by minorities and poorer people.

12. In making his assessments for 1977, defendant Tully had knowledge of the discrimination visited upon plaintiff. In each of the tax years 1974, 1975, 1976 and 1977, plaintiff sought administrative relief by filing complaints as to her assessments with the Board of Appeals of Cook County. In these complaints, she set forth facts, as alleged herein, with respect to such discrimination. That body referred each complaint to the defendant Tully for recommendation and the latter recommended "no change" in the assessment. Further, for over 20 years last past, the Illinois Department of Local Government Affairs and its predecessor in function, the Illinois Department of Revenue, have conducted official studies to determine the ratios of assessed valuation to fair cash value of properties in each of the 102 counties of Illinois. These studies are published annually and, for Cook County, were prepared from data supplied by the defendant Tully and the County of Cook. Tully knows of these studies and their contents. For example, for the year 1975, the latest year in print, the studies show that Tully assessed Class 3 property in such fashion that, for the County as a whole, property in this Class was assessed as low as 3% and as high as 973% of market value. The lowest twenty-five percent of all such

properties was assessed at less than 25% and the highest twenty-five percent at more than 50% of market value; while the lowest 10% was assessed at less than 18% and the highest 10% at more than 96% of such value. The greatest disparities and hence discrimination occurred in Assessment District 4 wherein plaintiff's property is situated. This District includes the south side of Chicago and the south suburban area, areas containing large concentrations of minorities and poorer people. A copy of the 1975* study is appended as Exhibit "B". The same discrimination and disparities resulting therefrom existed for 1977.

13. Plaintiff has exhausted her administrative remedies before the Board of Appeals of Cook County for 1977 and has received no relief therefrom. Her only remedy at law now requires her to pay in full the taxes levied against her property, viz $6,106.00, which includes the illegal moiety of $4,331 and the legal portion of $1,775, and thereafter sue for refund under the provisions of §§ 675 and 716 of Chapter 120, Illinois Revised Statutes, in the Circuit Court of Cook County in the defendant Rosewell's annual application proceedings. These proceedings will be commenced in late November or early December of this year. The customary delay in receiving refunds upon successful prosecution of such a suit is 2 years.

14. Plaintiff was required to pay similar exorbitant and discriminatory taxes for the years 1974, 1975 and 1976 and received refunds totaling approximately $12,200 for the three years in May of this year. Such refunds were the result of suits filed therefor in the Circuit Court of Cook County on defendant Rosewell's annual applications for such years. No interest may be

* The latest year in print.

paid upon tax refunds under Illinois law and plaintiff received none, notwithstanding that Cook County and other cognizant taxing bodies had the use of her funds in the form of illegally exacted taxes in the approximate amounts of $4,600 for 1974, $3,650 for 1975, and $3,950 for 1976, for periods of 3, 2 and 1 years respectively. At 8% interest, the average prime rate for the 3-year period, plaintiff lost approximately $2,000 for the use of her money or, in the alternative, was required to borrow money at appreciably more than the prime rate to pay the taxes so as to be able to avail herself of the only source of judicial review of her assessment and, therefore, the only remedy at law provided her by the laws and Courts of Illinois.

15. Requiring plaintiff to pay taxes upon her property in 3½ times the lawful amount and the amount at which property in the same class generally is assessed deprives her of rights of equal protection and due process secured to her under the 14th Amendment to the United States Constitution and under Article 1, § 2, of the Illinois Constitution. It further deprives her of rights of uniformity in taxation secured to her under Article IX, § 4, of the State Constitution and under the Revenue Act.

16. Plaintiff has no adequate remedy at law in this or any other court and has no plain, speedy and efficient remedy in the courts of Illinois. She has no grounds for equitable relief in the State courts, being able financially to pay her taxes in full and sue for refund albeit at substantial expense, loss and burden. Plaintiff realleges that under Illinois law, she may not receive interest on refunds of taxes.

17. Plaintiff has not paid her 1977 taxes which were due in part on March 1, 1978 with the final installment

due on August 1, 1978. She is willing and able to pay the just moiety of the taxes extended against her property. Unless enjoined the defendant Collector is about to and will, under provisions of §§ 706, *et seq.*, of Chapter 120, Illinois Revised Statutes, advertise that he will and thereafter proceed to apply for judgment and order of sale against plaintiff's property for the lien of delinquent taxes and thereafter sell her property for such lien. Such procedures will cause irreparable harm to plaintiff resulting either in loss to her of her property or requiring her to redeem from sale at penalty interest approximating 24% per year.

18. The legal and correct amount of plaintiff's taxes for 1977 is $1,776 based upon a fair market value of $46,000, a Class 3 factor of 33%, a multiplier of 1.4153 and a tax rate of $8.274 per $100.00 of equalized valuation.

WHEREFORE, plaintiff prays for a preliminary and permanent injunction enjoining the defendant Rosewell from listing, advertising, proceeding to judgment and order of sale and selling plaintiff's property for any amount in excess of the fair and legal taxes against her property which she prays this Court to find and which she will promptly pay.

LA SALLE NATIONAL BANK,
Trustee under Trust No. 44891
By /s/ James L. Fox
Its Attorney

JAMES L. FOX (I.D. No. 820)
ABRAMSON & FOX (I.D. No. 340)
One East Wacker Drive
Chicago, Illinois 60601
644-8500

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891, Plaintiff, vs. EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County, Defendants.	No. 78 C 3746

MOTION TO DISMISS

(Filed November 3, 1978)

Now come defendants, EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County, by their attorney, BERNARD CAREY, State's Attorney of Cook County, Illinois, and for their Motion to Dismiss state as follows:

1. Actions involving state tax assessments do not fall within the purview of 28 U.S.C. 1343 and 42 U.S.C. 1983.

2. The jurisdiction of the United States' District Courts to enjoin the assessment, levy or collection of state taxes where there is a plain, speedy and efficient remedy in the state courts is barred by 28 U.S.C. 1341.

3. Illinois provides taxpayers with a plain, speedy and efficient remedy by way of payment of the alleged

excessive taxes under protest and objection at the Collector's annual Application for Judgment. See Ill. Rev. Stat. 1977, ch. 120, §§ 675 and 716, and Clarendon Associates v. Korzen, 56 Ill. 2d 101 (1973). This remedy is plain, speedy and efficient. *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Matthews v. Rodgers*, 283 U.S. 52 (1932).

4. The mere denial of interest on a tax refund, after an alleged excessive assessment or tax is judged to be actually excessive, is insufficient to find that a state court remedy is not "plain, speedy and efficient." *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939).

5. The doctrine of comity requires this court to abstain because plaintiff has a state court remedy.

6. Plaintiff's Complaint fails to state a claim.

WHEREFORE, defendants respectfully move this court to dismiss plaintiff's Complaint.

BERNARD CAREY
State's Attorney of Cook County

By /s/ Michael F. Baccash
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
443-5444

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891, Plaintiff, vs. EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County, Defendants.	No. 78 C 3746

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

(Filed November 13, 1978)

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiff respectfully moves this Court to issue its preliminary injunction enjoining and restraining defendant, Edward J. Rosewell, Treasurer and ex-officio County Collector of Cook County, his agents and attorneys, from proceeding to judgment and order of sale, selling or attempting to sell plaintiff's property designated by Permanent Index No. 32 23 414 054.

In support thereof, plaintiff states:

1. On September 19, 1978, plaintiff filed a Complaint seeking a preliminary and, thereafter, permanent injunction against the defendant County Collector, enjoining him from proceeding to judgment against and order of sale of plaintiff's property for 1977 real estate taxes for

any amount in excess of the legal and fair taxes thereagainst.

2. The fair cash value of plaintiff's property on January 1, 1977 was $46,000.00. Pursuant to the pertinent provisions of Cook County Ordinance No. COM 76 815 of December 17, 1973, plaintiff's property should have been assessed at 33% of fair cash value, i.e., at $15,180.00, with a resulting tax liability of $1,778.00. Instead, defendant Tully assessed the property at $52,150.00, or at 344% of the legal amount and taxes in the amount of $6,106 were extended upon the excessive assessment and are now a lien upon the property which the defendant Collector is seeking to reduce to judgment and order of sale.

3. Defendants, acting under color of State law, viz. the Revenue Act of 1939, Chapter 120, Illinois Revised Statutes §§ 482, *et seq.*, have violated plaintiff's rights of due process and equal protection guaranteed it by the 14th Amendment to the Constitution of the United States. Such violation is actionable under 42 U.S.C. § 1983.

4. Plaintiff is ready and willing to pay the proper and just amount of real estate taxes on the property in the amount of $1,778.00, plus such statutory interest as may have accrued.

5. Plaintiff has no plain, speedy and efficient remedy at law in the courts of Illinois. Plaintiff's sole legal remedy is provided by §§ 675 and 716 of Chapter 120, Illinois Revised Statutes, under which plaintiff is required to pay the taxes in full and under protest and thereafter sue for refund in the Circuit Court of Cook County. This remedy is neither plain, speedy nor efficient, since there is a two year or longer delay in receiving refunds upon

successful prosecution of such a suit and Illinois law expressly provides that no interest shall be paid on refunds received.

6. Plaintiff will suffer irreparable harm if the defendant Collector proceeds to judgment against and sells the property for the lien of the excessive and illegal moiety of the tax. The only relief from such a sale is redemption requiring payment of the tax in full plus penalty interest levied at the rate of 12% every six months. If the property is redeemed, the issue of relief is rendered moot; if not redeemed, plaintiff will be divested of title to a $46,000 building for the amount of the taxes sold, i.e., $6,106.00.

7. Although injury to the plaintiff would be irreparable should this Motion be denied, if it be granted neither the defendants nor the public will suffer harm or burden. The lien of taxes will continue against plaintiff's property together with interest thereon. Further, the public's interest in proper administration of the tax laws will be served by the issuance of an injunction.

8. There is no meritorious defense either at law or on the facts to plaintiff's cause of action and plaintiff thus has a reasonable likelihood of prevailing ultimately.

9. In further support of this Motion, plaintiff appends hereto the Affidavit of the beneficiary of the plaintiff land trust, exhibits thereto and its memorandum of law.

LaSalle National Bank, Trustee
under Trust No. 44891

By /s/ James L. Fox
Its Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891, Plaintiff, vs. EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County, Defendants.	No. 78 C 3746

AFFIDAVIT

(Appendices omitted)

PATRICIA COOK, on oath, states that she has personal knowledge of the facts set forth in this Affidavit and if called as a witness could and would testify competently thereto:

1. She was the beneficial owner of LaSalle National Bank Trust No. 44891 on January 1, 1977 and has been at all relevant times. A copy of the Trust Agreement is appended hereto as Exhibit "A".

2. The property which is the subject matter of this suit is improved with a 22-apartment building. All of the apartments are efficiency units. It was purchased in an arms length transaction from the FSLIC in 1972 for $45,000 and on January 1, 1977 had a fair cash value of $46,000.

3. Affiant procured an appraisal of the property in 1976 from Donald A. Engel, MAI, appraising the

property at $46,000.00 A copy thereof is appended as Exhibit "B" to this Affidavit. No change in the physical structure other than normal wear and tear occurred between February 3, 1976, the date of appraisal, and January 1, 1977, the assessment date; and no change in fair cash value occurred in that period. As of the date of this Affidavit, affiant offers to sell the property for the above appraised value.

4. Affiant paid taxes of approximately $6,000 each year for 1974, 1975 and 1976 under protest and sued for refund and received refunds of $4,600 for 1974, $3,650 for 1975 and $3,950 for 1976 after waiting for 3, 2 and 1 year respectively. Affiant received no interest on these refunds.

5. The Village of East Chicago Heights is an all black community with the lowest per capita income and lowest value of residential properties in the County as shown by the DePaul University urban studies. Property values are greatly depressed in the Village and many homes are boarded up and abandoned, notwithstanding efforts of the FHA and other governmental agencies to remove or renovate blighted properties and areas.

And further she sayeth not.

By /s/ Patricia Cook

[Jurat omitted in printing.]

No. 79-1157

In the Supreme Court of the United States

October Term, 1979

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,
Petitioners,

vs.

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,

Petitioners,

vs.

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (App. 1a-19a) is reported at 604 F2d 530 (7th Cir. 1979). The opinion of the district court (App. 20a-21a) is not officially reported.

Jurisdiction

The decision of the Court of Appeals was entered on August 24, 1979 (App. 1a), the petition for rehearing and

suggestion for rehearing *en banc* was denied on October 30, 1979, and the instant petition for writ of certiorari was filed on January 26, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals was correct in holding that the denial of interest on tax refunds by the Illinois courts renders the state remedy inadequate within the meaning of 28 U.S.C. §1341, thereby removing its bar to federal jurisdiction in an injunctive proceeding.

Whether the Court of Appeals was correct in holding that the availability of an action under 42 U.S.C. §1983 in the Illinois courts does not bar federal jurisdiction over a section 1983 action alleging constitutional deprivations arising from an illegal tax action.

STATEMENT OF THE CASE

a. Earlier Proceedings

Taxpayer, Patricia Cook,[1] the owner of an apartment building in the all black, economically depressed Village of East Chicago Heights in Cook County, Illinois, brought this action in the United States District Court for the Northern District of Illinois under 42 U.S.C. §1983 seeking a preliminary and permanent injunction against the respondent County Collector from proceeding to judgment and order of sale against and from selling her property for unpaid 1977 Cook County real estate taxes which she alleged to be assessed at over three times the legal amount, viz., the amount at which property in her class was assessed

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[1] Although La Salle National Bank, Trustee under land trust No. 44891 is the named respondent, Patricia Cook, as sole beneficiary under the Trust, is the real party in interest.

and taxed generally in the County. Jurisdiction was invoked under 28 U.S.C. §1343(3). The district court denied taxpayer's motion for a preliminary injunction and dismissed the case, holding 28 U.S.C. §1341 a bar to federal jurisdiction. (App. 20a)[2] That court granted an injunction pending appeal. Fed. R.Civ.Proc. 62(c). The Seventh Circuit reversed, 604 F.2d 530 (1979).

b. Facts Assumed True for Purposes of Appeal[3]

On January 1, 1977, the assessment date for levying of 1977 real estate taxes, taxpayer alleged that her property had a fair cash value of $46,000 and, if assessed in accordance with the Illinois statutes and Cook County ordinance, should have been assessed at 33% of its fair cash value or approximately $15,000.00. Petitioner-Assessor, however, assessed the property at $52,150, over three times the legal amount. As a result, the taxes levied against the property, viz., $6106, were about three and a half times the proper and legal taxes of $1775.

The Cook County Assessor knowingly as official policy or as governmental custom has maintained a system of assessment in Cook County which has produced egregious disparities in the ratios between the assessed valuations and the fair cash values of real properties. Over-assessments are greater in frequency and size in older communities in which property is owned and inhabited primarily by members of racial minority groups and the economically disadvantaged.

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[2] References to the Appendices are to Petitioners' Appendix included with their Petition.

[3] The well pleaded factual allegations of respondent-plaintiff's complaint are taken as true. *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1975), Fed.R.Civ.P. 12(b)(1).

In 1977, as well as in each of the preceding three years (in which her property similarly was overassessed), respondent sought administrative relief from the Board of Tax Appeals of Cook County. In each of those years, the Board referred her complaint to the Assessor for recommendation, and in each year the Assessor recommended "no change" in the assessment. The Board denied taxpayer's petition for administrative relief each year.[4]

Having been denied administrative relief, taxpayer's only remedy at law was to pay the full amount of the tax claimed by the county collector (defendant-petitioner Rosewell, Treasurer of Cook County) pursuant to the assessor's assessment, and thereafter to object and sue for refund at the collector's annual Application for Judgment in the Cook County Circuit Court. See 120 Ill.Rev.Stat. §§675, 716. The customary delay in receiving refunds in a suc-

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[4] Petitioners' recitation in their Statement of the Case (Petition 6, fn.), of administrative and judicial remedies for overassessments available to Illinois taxpayers, is irrelevant. Notwithstanding the mandates of the Illinois Revenue Act of 1939, Chapter 120, Illinois Revised Statutes, 594, 598, 608, taxpayer has continually been denied administrative relief under those statutory provisions. Taxpayer, as noted, unsuccessfully sought administrative relief in 1974, 1975, 1976 as conditions precedent to her judicial actions. *C.f., People ex rel. Korzen* v. *Fulton Market Cold Storage Company,* 62 Ill.2d 443, *cert. denied,* 429 U.S. 833 (1976). She did so also in 1977 prior to bringing the suit below; and, notwithstanding the pendency of this suit, 1978 complaints filed before both the Assessor and Board of Appeals of Cook County proved fruitless, whereupon she again sought relief in a now pending suit in the District Court, 79 C 4864. See also *Fulton Market Cold Storage Company* v. *Cullerton,* 582 F.2d 1021 (1978). Nor is injunctive relief available to taxpayer in the state courts. As petitioners admitted in their Petition for Rehearing in the Seventh Circuit: "The facts pleaded in the complaint show that the taxpayer is not entitled to equitable relief under Illinois law. See *Clarendon Associates* v. *Korzen,* 56 Ill.2d 101 (1973)." (Pet. Rehearing, 3, fn.)

cessfully prosecuted tax refund suit is two years. Under Illinois law, no interest may be paid to a successful claimant who has secured the refund of real estate taxes paid under protest.[5]

In three successive Circuit Court actions taxpayer pursued her legal remedy for 1974, 1975 and 1976 tax refunds and ultimately received these refunds for all three years in May, 1978. She had been required to pay illegally exacted taxes in the approximate amounts of $4,600 for 1974, $3,650 for 1975, and $3,950 for 1976, these being the amounts of refunds. The Court found over and above the taxes justly due. For the three, two and one year delays, respectively, given 8% interest (the average prime rate over the three-year period), she lost approximately $2,000 because of her inability to use money which ultimately was deemed to be rightfully hers.

In her suit at bar, taxpayer contends that approximately $4,300 of her 1977 tax bill of $6,106 is an illegal overcharge and that in order to pursue the State remedy she would be forced to pay the $4,300, with no possibility of receiving interest on a refund, along with her correct tax payment. Rather than paying her 1977 taxes under protest and suing for a refund of $4,300.00, on September 19, 1978 taxpayer filed the within action in the district court seeking to enjoin collection procedures for the illegal portion while standing ready to pay such just taxes as the district court may find to be due.

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[5] Petitioners referral to and distinction with respect to pre-judgment interest in their Statement requires clarification. The order of refund in the Illinois statutory procedure does not provide for interest on the refund during the period from the date of payment of taxes to the date of order of refund; nor does the order of refund itself, unlike a judgment, bear interest for the not inconsiderable period from the date of its entry by the Court until the refund is paid by the County Collector. 120, Ill.Rev.Stat., §§675, 716.

(Emphasis added unless otherwise indicated)

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Held That the No-Interest Refund Remedy in the Illinois Courts is Not Plain, Speedy and Efficient, Thus Removing the Bar of §1341 to Federal Jurisdiction of Respondent's Claim

There is no doubt that the tax discrimination complained of by respondent is constitutionally offensive, *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20 (1907); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918), and remediable in an action under Section 1983. *Garrett* v. *Bamford*, 538 F2d 63 (3rd Cir.), *cert. denied*, 429 U.S. 977 (1977); *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F2d 1071 (7th Cir. 1978), *cert. denied*, 429 U.S. 1121 (1979); *Weissinger* v. *Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971) (three judge court). It is equally well settled that Section 1983 offers a "*uniquely federal*" remedy, *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972), having been passed to afford "a federal right *in federal courts*". *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961). Federal courts, when properly appealed to under Section 1983 or upon any other federal basis, have a "virtually unflagging obligation to exercise" their jurisdiction, *Colorado River Water Conservation District* v. *U.S.*, 424 U.S. 800, 817 (1976), for the "right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.*, 212 U..S 19, 40 (1909); *New Jersey Education Association* v. *Burke*, 579 F.2d 764, 771 (3rd Cir. 1978), *cert. denied*, 439 U.S. 894 (1974). If, therefore, respondent

does not have a plain, speedy and efficient remedy in the courts of Illinois, the bar of Section 1341 is removed and, as a matter of right, she is entitled to a federal forum to seek injunctive relief to remedy the constitutional deprivation visited upon her, under color of law, by the petitioning tax officials.

Under the circumstances presented by her case, neither injunctive nor declaratory relief is available to respondent in the courts of Illinois, *Clarendon Associates* v. *Korzen,* 56 Ill.2d 101 (1973); *Goodyear Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421 (1952). The only remedy she can pursue is that provided by statute of paying the excessive tax in full under protest and suing for refund. 120 Ill.Rev.Stat. Sections 675, 716; *Clarendon, supra.* Under this statutory remedy interest, not having been authorized by statute, cannot be paid on refunds:

> "We are of the opinion that the silence of our refund statute on the question of interest discloses a legislative intention to deny it. Accordingly, we conclude that plaintiff is not entitled to interest in the absence of a statute imposing that liability." *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill.2d 415, 423 (1960).

See also *Chrysler Corp.* v. *Gunderson,* 77 Ill.App.3d 558, 560-1 (1979). Nor does this denial of interest "render the remedy inadequate so as to justify equity in assuming jurisdiction." *Clarendon, supra,* 56 Ill.2d at 109. The Court of Appeals has, in Part A of its opinion, dealt extensively and cogently with the issue of the inadequacy of a remedy not affording interest on refunds (App. 6a-12a). The reasons given there amply support its conclusion that Illinois' no-interest remedy is not plain, speedy and efficient.

That conclusion does not, as petitioners suggest (Pet. 15), conflict with *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972). The allegation in *Bland* that "Mississippi law makes

no provision for the recovery of interest on illegally assessed taxes", at 28, n. 24, was not discussed by the court in its opinion and, unlike here, formed no part of the *ratio decidendi.* Rather, in *Bland,* the court found that Mississippi statutes provided adequate remedies, including a means for administrative hearings of taxpayer assessment objections and *de novo* appeals thereof to the circuit court, a procedure not available to Illinois residents of Cook County. See 120 Ill. Rev. Stat. §592.1-5. Patently, there is no conflict.

Notably, the issue here is not whether the granting of interest is a matter of statute and not of right, nor whether Illinois' adherence to a no-interest rule is proper (Pet. 15). *Lakefront, supra,* 19 Ill.2d at 423. Illinois is concededly free to follow such a rule. But in doing so, Illinois must recognize that it imposes substantial economic burdens which affect the adequacy of the remedy it provides. As "the remedy's diseconomies" (App. 11a) in *Georgia RR* v. *Redwine,* 342 U.S. 299 (1952) sufficed to render a procedure requiring financially burdensome multiple suits inadequate, so here a refund procedure that takes two years and disallows interest is inadequate because of the "undue costs" it entails (App. 11a).[6]

In fine, it is a subversion of reality for a body politic to maintain, in the economic milieu of the day, that a tax refund procedure which requires payment in full of the illegal portion of a tax, as a condition precedent to obtaining judicial review and relief, and denies interest on the money refunded, the interest on which the body has reaped for two years, constitutes an adequate, a plain, speedy and

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[6] Contrary to petitioners' view (Pet. 17), it was the undue economic burdens of the state remedy at law and not the fact that the railroad might be exempt from taxation which rendered the state remedy inadequate in *Redwine.* 342 U.S. at 303.

efficient remedy.[7] Is it not indeed harsh treatment of the citizens who, suffering a constitutional deprivation of their substance by public officials acting under color of law, have a dollar of that substance returned two years later worth but seventy-five cents under today's double digit inflation? And then to be told by the highest court of their state that the remedy the *parens patriae* affords them, is adequate? Indeed, if Judge Learned Hand's analysis of the inadequacy of such procedure in 1924 was valid, *Proctor & Gamble Co.* v. *Sherman,* 2 F2d 165, 166 (S.D. N.Y.) cited by the court below, 604 F2d at 536; App. 12a, how much more so today!

II.

The Court of Appeals Correctly Held that the Availability of An Action Under 42 U.S.C. §1983 in the Illinois Courts Does Not Bar Federal Jurisdiction Over a Section 1983 Action Alleging Constitutional Deprivation Arising From an Illegal Tax Action

Petitioners seek to avoid the holding of the Court of Appeals by readvancing their argument, made in that court, that the possibility of state court jurisdiction over a 1983 action preserves the bar of Section 1341. The contention is without merit.

In urging rehearing, petitioners candidly stated to the Court of Appeals: "The facts pleaded in the complaint show that taxpayer is not entitled to equitable relief under

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[7] As noted, §675 of Chap. 120 Ill. Rev. Stat. permits the County Collector to withhold from the taxing bodies certain taxes paid under protest, and to invest them pending judicial resolution of the disputed assessments. Not only does this financial benefit accrue to the County from the date of payment to date of order of refund, but accrues from the date of the order to date of actual payment, a time period averaging from 6 weeks to 2 months.

Illinois law." (Pet. for Rehg. 3, n.). If this is so, it is difficult to see how the inadequacy of the Illinois remedy will be avoided by respondent's resort to a state court proceeding even under Section 1983. See *Chrysler Corp.* v. *Gunderson,* 77 Ill. App. 3d 558, 560-561 (2nd Dist. 1979), where the Court refused to grant injunctive relief, notwithstanding reference to the rule announced in the court below stating:

> "This holding [in LaSalle] has no effect on whether a remedy is adequate for the purposes of relief sought in Illinois courts."

Moreover, for petitioners' argument to stand, this Court must rule that, upon respondent's invocation of Section 1983, the state court must unwillingly set aside its settled rules for refusing equitable jurisdiction in tax cases, see *Clarendon Assn.* v. *Korzen, supra; Chrysler, supra,* open its door, perforce, to injunctive relief in every tax discrimination case, also *contra* holdings of Illinois courts for over a hundred years (see cases, Pet. 7-8) and literally sit as the federal district court in such cases. Notwithstanding "the silence of [Illinois'] refund statute . . . discloses a legislative intent" to deny interest on refunds, *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill. 2d 415, 423 (1960), under petitioners' approach Illinois courts presented with a 1983 claim would be required not only to award interest as an element of damage in damage actions, *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* but also to allow interest on judgments in the annual statutory refund proceeding. 120 Ill. Rev. Stat. §§675, 716. Illinois would lose the discretion which she now enjoys to *choose, U.S. and E.I. du Pont de Nemours & Co.* v. *Livingston,* 179 F. Supp. 9, 15 (E.D. S.C. 1959) (three judge court), *aff'd per curiam,* 364 U.S. 281 (1960) not to afford an adequate remedy. Plainly such results would maximize rather than minimize federal-state friction, upset the delicate interests of comity bal-

anced below (App. 12a), and emasculate the policy considerations behind Section 1341.[8]

Finally, whatever else may be said about the question of whether the Illinois courts will entertain 1983 actions and do an about-face on their long-asserted right to deny equitable relief, it cannot seriously be argued that the course the state court would take under such circumstances is settled or sufficiently free from doubt as it is required to be to render the Illinois remedy adequate. *Hillsborough* v. *Cromwell,* 340 U.S. 620, 629 (1924); *Tully* v. *Griffin,* 429 U.S. 68, 76 (1976); *Garrett* v. *Bamford, supra,* 538 F2d at 70; *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F2d 439, n.4 (7th Cir. 1975), *rehearing denied, cert. denied,* 424 U.S. 959 (1976). On the contrary, if anything is settled, it is that the Illinois courts will *not* apply federal equity principles when presented with a Section 1983 case involving allegation of discriminatory taxation by local taxing bodies.

As an example, in *People ex rel. Korzen* v. *Fulton Market Cold Storage Company,* 22 Ill. App. 2d 3rd 1088 (1st Dist. 1974), *rev'd,* 62 Ill. 2d 443, *cert. denied,* 429 U.S. 833 (1976), a taxpayer sought a refund from the Illinois courts

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[8] Petitioners err in saying the decision below allows "any and every Illinois taxpayer desirous of litigating tax assessments" (Pet. 7) access to the federal court. To enter the federal court, a taxpayer must allege a constitutional deprivation worked under color of law and, according to petitioners, these jurisdictional prerequisites will "seldom" arise (Pet. 7). If, on the other hand, the 1100 valuation objections noted by petitioners (Pet. 12, n.) do involve constitutional discrimination, serious doubt would exist about the constitutionality of the Cook County assessing procedures and the need of federal court protection could not be gainsaid. In any event, it is difficult to see what policy interest behind Section 1341 would be served by flooding the Illinois courts with Section 1983 injunction suits.

in the statutory proceeding alleging, *inter alia,* a count under Section 1983. The taxpayer raised the 1983 claim in the trial court and argued it in both the Illinois Appellate and Supreme Courts, contending that because a federal cause of action under Section 1983 was involved, the federal doctrine controlled that in a civil rights action the state remedy "need not be first sought and refused before the federal one is invoked". *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961). 22 Ill.App.2d at 1089; see *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963). The Illinois Supreme Court, however, squarely held that the Illinois doctrine requiring exhaustion governed and dismissed taxpayer's complaint.[9] 62 Ill.2d at 446-447. There is no reason to believe the Illinois courts would take a different approach here and put aside the state rule that a no-interest remedy is adequate and adopt the contrary federal rule.[10]

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[9] When a federal court was presented with Fulton's Section 1983 claim, it applied the federal rule on exhaustion and sustained the taxpayer's complaint. *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071, 1080 (7th Cir., 1978).

[10] The ruling below does not "always transfer the risk of taxpayer insolvency to the government" (Pet. 10). Respondent has offered to pay the just portion of the disputed 1977 tax so that no delay in the collection of proper taxes would occur. In *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F.2d 439 (7th Cir. 1975) (Pet. 10) taxpayer contended that the Assessor's discriminitory practices were rendering its property unmortgageable and unsaleable, thus creating the risk of insolvency to which petitioners refer.

CONCLUSION

It is clear that Illinois' no-interest, no-injunction remedy is inadequate. Not only does it visit "undue costs" (App. 11a) on taxpayers, but it gives the Cook County Assessor an economic incentive to disregard his duties. Indeed, respondent has been over-assessed now five years in a row and still cannot get adequate relief in the state courts. Hence, this case is exactly what Section 1983 is all about for it has become certain that only a federal cause of action heard in a federal court will thwart petitioners' malicious abuse of the taxing power under color of law. The Court of Appeals was correct in holding the state remedy inadequate and the bar of Section 1341 avoided. The Petition for Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

VS.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, at 1a-19a) is reported at 604 F.2d 530 (7th Cir. 1979). The opinion of the district court (Pet. App. B, at 20a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A, at 19a) was entered on August 24, 1979. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on October 30, 1979 (Pet. App. C, at 22a-23a). The petition for a writ of certiorari was filed on January 26, 1980 and was granted on March 17, 1980. The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the district court has jurisdiction under 28 U.S.C. § 1343(3) to entertain cases involving constitutional challenges to the collection of state taxes.

2. Whether the availability of a § 1983 action in Illinois courts bars district court jurisdiction under the Tax Injunction Act of 1937 (28 U.S.C. § 1341).

3. Whether the Illinois statutory real estate tax remedy, which denies pre-judgment interest, is plain, speedy, and efficient within the meaning of the Tax Injunction Act of 1937 (28 U.S.C. § 1341).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Statutes provide in pertinent part:

Title 28 U.S.C.

§ 1341. Taxes by States:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42 U.S.C.

§ 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Illinois Constitution and the Statutes of Illinois provide in pertinent part:

> (The relevant constitutional and statutory provisions involved in this case are lengthy and therefore are reproduced in the appendix to the brief.)

Those provisions include:

Article IX, Section 4, Illinois Constitution of 1970 ..... 1a

Ill. Rev. Stat. 1977, ch. 120, sec. 501a 1a

Ill. Rev. Stat. 1977, ch. 120, sec. 578 ..... 1a

Ill. Rev. Stat. 1977, ch. 120, sec. 594 ..... 2a

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Ill. Rev. Stat. 1977, ch. 120, sec. 716 ..... 5a

Cook County Ordinance #COM 76815, 12-17-73 ..... 7a

STATEMENT OF THE CASE

Introduction

The issues presented for decision in this case arise from a tax injunction suit filed by the taxpayer in the United States District Court for the Northern District of Illinois. The taxpayer maintains that the state statutory legal remedy, which is available and usually followed in the situation involved herein, is not plain, speedy and efficient because pre-judgment* interest is not paid on refunds received in the state court. The taxpayer has also contested the efficiency of a state court action based on 42 U.S.C. § 1983 to remedy the alleged overassessment of the property. The court below agreed with these arguments and upheld federal jurisdiction.

The case is presented on the pleadings only, since the district court granted the petitioners' motion to dismiss. The well pleaded allegations of the complaint thus form the factual basis for the determination of the issues raised herein. *Walker Process Equipment Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-75 (1965).

Illinois Real Estate Tax Authority

In order to appreciate the basis for the taxpayer's allegations, it is necessary to set out the constitutional, statutory and ordinance authority by which the real estate tax is imposed in Cook County, Illinois.

---

* "Pre-judgment interest" as used in this brief means interest upon tax refunds computed from the time of payment to the time of the entry of the order of refund.

Article IX, Section 4(b) of the Illinois Constitution of 1970 provides that:

> ". . . counties with a population of more than 200,000 may classify or continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county." (A. 4-5)*

This provision applies to Cook County, Illinois. Ill. Rev. Stat. 1977, ch. 120, sec. 501a requires that:

> "Where real property is classified for purposes of taxation in accordance with Section 4 of Article IX of the Constitution and with such other limitations as may be prescribed by law, such classification must be established by ordinance of the county board. If not so established, the classification is void." (A. 5)

In pursuance of this statute, Cook County, on January 1, 1977 had in effect County Ordinance #COM 76815 of December 17, 1973 which provided in part as follows (A. 5-6):

> "Section 2. Real estate is divided into the following assessment classes:
>
> . . .
>
> Class 2: Real estate used for residential purposes when improved with a house, an apartment building of not more than six living units, or residential condominium, a residential co-operative or a government-subsidized housing project if re-

* The Appendix attached to this Brief will be referred to as "Br. Ap.," and the separate Appendix will be referred to as "A.".

quired by statute to be assessed in the lowest assessment category.

Class 3: All improved real estate used for residential purposes which is not included in Class 2.

. . .

Section 3. The Assessor shall assess, and the Board of Appeals shall review assessments on, real estate in the various classes at the following percentages of market value:

. . .

Class 2: — 17%
Class 3: — 33%

. . . "

The Taxpayer's Assessment And Taxation

On January 1, 1977 the taxpayer's property, a 22 apartment rental property located in East Chicago Heights, Illinois, was indexed, assessed and taxed as follows (A. 4):

Permanent Index Number	Volume	Assessed Valuation	Equalized Valuation	Rate	Tax
32-23-414-054	16	52,150	73,808	8.274	$6,106.00

The *permanent index number* and *volume* referred to above are property identifiers keyed to the legal description of real estate contained in county records. The *assessed valuation* is the fair cash value of the subject real estate as of January 1, 1977, reduced to the appropriate percentage indicated by the Cook County Classification Ordinance and certified by the Assessor of Cook County. The *equalized valuation* is the product of the assessed value multiplied by an equalization factor prepared by a department of the state government

charged with maintaining inter-county uniformity in taxation. The *rate* is established by dividing the total amounts levied by the taxing agencies in whose jurisdiction the subject property lies, by the equalized assessed valuation of all properties which lie in those tax agencies' jurisdiction.

Pleadings

The taxpayer's complaint, premised solely upon 28 U.S.C. § 1343(3) (Par. 3; A. 3) alleged that her property had a fair cash value of $46,000 on January 1, 1977, but was incorrectly assessed by the assessor at $52,150. The taxpayer alleged that the correct assessment was $15,180 (i.e. 33% of taxpayer's alleged fair market value of $46,000), and that the official assessment was three and one-half times higher than it should have been. (Complt. par. 10; A. 6.)

The taxpayer alleged that her property was over-assessed in 1974, 1975 and 1976, that she had pre-paid taxes in full for those years and received refunds without interest. (Complt. par. 14; A. 8.) The taxpayer alleged that the systems employed to make assessments in Cook County "have produced egregious disparities in assessment throughout the County". (Complt. par. 11-12; A. 7-8.)

The taxpayer asserted that her only remedy in the state court was by way of payment under protest of the full amount of tax claimed by the collector, and thereafter objecting at the collector's annual Application for Judgment. (Ill. Rev. Stat. 1977, ch. 120, sec. 675 and 716). The taxpayer alleged that the customary delay in receiving refunds upon successful prosecution of such a suit is two years, and that the courts of Illinois do not

award interest to taxpayers who successfully follow the statutory remedy. (Complt. par. 13, A. 8)

The taxes sought from the taxpayer were $6,106. The taxpayer asserts the proper amount to be $1,776. (Complt. par. 18, A. 10) Thus if she wins her case she will be entitled to an injunction against the collection of the allegedly excessive tax—$4,300.

The collector moved to dismiss on the following grounds:

1. Actions involving state tax assessments do not fall within the purview of 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

2. The jurisdiction of the United States District Courts to enjoin the assessment, levy or collection of state taxes where there is a plain, speedy and efficient remedy in the state courts is barred by 28 U.S.C. § 1341.

3. Illinois provides taxpayers with a plain, speedy and efficient remedy by way of payment of the alleged excessive taxes under protest and objection at the collector's annual Application for Judgment.* This remedy is plain, speedy and efficient.

---

* Illinois provides at least the following remedies to a taxpayer whose real estate is overassessed:

1. Administrative, pre-assessment—The assessor cannot increase a real estate assessment in a non-quadrennial year without first giving the taxpayer notice of such proposed increase and the right to be heard thereon. See Ill. Rev. Stat. 1977, ch. 120, secs. 578, 579, *Goodfriend v. Board of Appeals*, 18 Ill. App. 3d 412, 305 N.E.2d 404 (1st Dist. 1973).

2. Administrative, post-assessment—The assessor has discretion, upon application by the taxpayer to offer a certificate of error in certain situations. See Ill. Rev. Stat. 1977, ch. 120, sec. 604.

3. Administrative, assessment review—Prior to issuance of the tax bills, the Board of Appeals of Cook County has statutory power to review assessments and order them

(Footnote continued on following page)

4. The mere denial of interest on a tax refund, after an alleged excessive assessment or tax is judged to be actually excessive, is insufficient to find that a state court remedy is not plain, speedy and efficient.

5. The doctrine of comity requires the district court to abstain because plaintiff has a state court remedy.

6. Plaintiff's Complaint fails to state a claim. (A. 11-12)

The District Court Ruling

On November 30, 1978, the district court dismissed the Complaint for want of jurisdiction. The district court stated:

---

* *continued*
corrected. See Ill. Rev. Stat. 1977, ch. 120, secs. 594, 598; *People ex rel. Korzen v. Fulton Market Cold Storage*, 62 Ill. 2d 443, 343 N.E.2d 450 (1976).

4. Statutory legal remedy—With payment under protest and exhaustion of administrative remedies, a taxpayer may file an objection to the collector's application for judgment and sale of delinquent real estate. The circuit court possesses the power in this proceeding to determine whether the assessment is correct. See Ill. Rev. Stat. 1977, ch. 120, secs. 675, 716; *LaSalle National Bank v. County of Cook*, 57 Ill. 2d 318, 312 N.E.2d 252 (1974).

5. Injunctive Relief—A taxpayer may obtain injunctive relief when the legal remedy is unavailable. *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973); *28 East Jackson Enterprises v. Cullerton*, 523 F.2d 439 (7th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). Supplemental Opinion upon Denial of Rehearing, 551 F.2d 1093 (7th Cir. 1976), *cert. denied*, 434 U.S. 835 (1977).

6. The remedies available to a taxpayer in Illinois include a 42 U.S.C. § 1983 claim. The Illinois Appellate court for the District in which the taxpayer's property is located has stated that, ". . . the courts of the State of Illinois have concurrent jurisdiction with the Federal courts to hear claims founded upon alleged violations of 42 U.S.C. § 1983." *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295, 323 N.E.2d 110 (1st Dist. 1974).

1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a "plain, speedy and efficient" remedy. *Tully v. Griffin*, 429 U.S. 68 (1976).

2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not "plain, speedy and efficient". (Pet. App. B. at 20a.)

The district court did not rule upon the other grounds set forth in the collector's motion to dismiss. The district court did, however, grant the taxpayer an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

The Court Of Appeals Ruling

The court below unequivocally held that the remedies available to a taxpayer under Illinois' statutes and cases do not square with the requirement of the Tax Injunction Act, 28 U.S.C. § 1341, that they be plain, speedy and efficient.

In particular the court focused upon (1) the failure of the prepayment remedy of Ill. Rev. Stat. 1977, ch. 120, secs. 675, 716 to provide for the payment of interest upon refunds of successfully protested taxes, and (2) the question of whether the admitted availability of Illinois courts of a § 1983 action bars jurisdiction under 28 U.S.C. § 1341. The court of appeals stated:

> "Our review of the respective legislative histories of the Tax Injunction Act and section 1983 leads to the conclusion that Congress did not intend that the possibility of bringing a section 1983 action in state court would bar, pursuant to the Tax Injunction Act, federal jurisdiction over a section 1983 action brought in federal court. Further, we have conclud-

> ed that there is no legal or equitable remedy available under Illinois law which is "plain, speedy and efficient."

LaSalle, 604 F.2d at 540.

The collector petitioned for rehearing and suggested a rehearing *en banc*. The order of October 30, 1979 notes that "Judges Pell, Sprecher, Bauer and Wood voted to grant the suggestion for rehearing *in* [*sic*] *banc*." (Pet. App. C at 22a-23a). The regular active judges of the Seventh Circuit thus split 5 to 4 on the rehearing question.

SUMMARY OF ARGUMENT

I.

The collector contends that the district court lacks jurisdiction under 28 U.S.C. § 1343(3) to entertain cases involving constitutional challenges to the collection of state taxes. The threshold question of the complaint's compliance with the specificity requirements of *Snowden v. Hughes*, 321 U.S. 1 (1944) as to allegations of tax discrimination is also presented. These questions are jurisdictional and were raised below in the collector's motion to dismiss. Review of these issues is thus supported by *City of Kenosha v. Bruno*, 412 U.S. 507, 511-13 (1973).

When this Court decided *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972) it did not overrule *Carter v. Greenhow*, 114 U.S. 317 (1884), *Pleasants v. Greenhow*, 114 U.S. 323 (1884), or *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900) but rather dis-

tinguished their denial of federal jurisdiction as ". . . consistent with congressional restriction of federal jurisdiction in this special class of cases, and with longstanding judicial policy." *Lynch*, 405 U.S. at 542-43, n.6. Since the case at bar is a tax injunction suit, the restrictions set out in *Carter*, *Pleasants*, and *Holt* apply. This proposition has been articulated by the District Court for the Northern District of Illinois and affirmed by the Seventh Circuit. See *Czajkowski v. State of Illinois*, 460 F. Supp. 1265, 1277 (N.D. Ill. 1977) *aff'd. unpublished order*, 588 F.2d 839 (7th Cir. 1978), holding that, ". . . constitutional challenges to the collection or validity of state taxes form a special class of cases which fall outside the jurisdictional parameters of 28 U.S.C. § 1343(3)."

Pleadings alleging violation of rights allegedly protected by the Fourteenth Amendment must assert "intentional or purposeful discrimination between persons or classes." *Snowden*, 321 U.S. 1, at 7. The complaint specifically alleges that the taxpayer's property was overassessed, but fails to specify the intent or purpose which assertedly renders the assessment violative of the equal protection clause. The complaint thus fails to allege a sufficient case of unconstitutional discrimination under this Court's early cases, or under modern interpretations of the Fourteenth Amendment in relation to tax assessment cases. Neither does the complaint allege a violation of the taxpayer's due process rights under the Fourteenth Amendment, *McGovern v. New York*, 229 U.S. 363 (1913), since the taxpayer has a number of remedies available in Illinois to challenge her assessment.

II.

The collector contends that the right of the taxpayer to challenge her real estate tax assessment by a § 1983 action in Illinois courts provides a plain, speedy, and efficient remedy and thus precludes federal jurisdiction. The great weight of authority supports concurrent state jurisdiction of § 1983 actions. With the exception of the court below in the case at bar, the lower federal courts have been unanimous in their approval of a state § 1983 action as a plain, speedy, and efficient remedy in tax assessment cases so as to bar federal jurisdiction under the Tax Injunction Act.

The contrary holding of the court below is out of step with the specific direction of the Court in *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) that "a federal court is under an equitable duty to refrain from interfering with a state's collection of its revenue except in cases where an asserted federal right might otherwise be lost." *Tully*, 429 U.S. at 73; and with the comity principles reaffirmed by the Court in *Trainor v. Hernandez*, 431 U.S. 434 (1977).

III.

The collector contends that the statutory real estate tax remedy, which denies pre-judgment interest, is a plain, speedy, and efficient remedy within the meaning of the Tax Injunction Act of 1937. (28 U.S.C. § 1341) Federal jurisdiction was therefore barred. The Supreme Court of Illinois has held that pre-judgment interest on tax refunds accomplished through successful protest of real estate assessments is not allowable unless a state statute provides for it. That court stated ". . . we conclude that plaintiff is not entitled to interest in the absence of a statute imposing that liability. This being

so, the failure of the statutory remedy to provide for the recovery of interest is no measure of its adequacy or inadequacy." *Lakefront Realty v. Lorenz*, 19 Ill. 2d 415, at 423, 167 N.E.2d 236, at 241 (1960). The collector contends under § 1341 that if pre-judgment interest is not an element of damage in tax assessment cases, then a state statutory remedy which does not award pre-judgment interest is permitted. The weight of authority supports denial of pre-judgment interest where the tax is not unauthorized by law, but is excessive. It makes sense, also, to permit the legislatures of the several states to determine the extent to which pre-judgment interest is warranted. The fundamental policy judgment which is inherent in such a question is best left to the state, which has constitutional responsibility for its tax collection system. Furthermore, the comments made by the sponsor of § 1341, Senator Bone, indicate that a remedy is not plain, speedy, and efficient only where the taxpayer is given less than a full and fair hearing as to the tax controversy. Therefore, denial of pre-judgment interest has not been, historically, one of the factors which are considered in determining the adequacy of the state remedy under § 1341.

ARGUMENT

Introduction

Anticipatory federal relief against state tax collections is prohibited for very specific reasons based upon the states' financial and governmental needs.

As Mr. Justice Brennan has noted in his concurrence in *Perez v. Ledesma*, 401 U.S. 82 (1971):

> The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts. See generally, S. Rep. No. 1035, 75th Cong., 1st Sess. (1937).

Perez, 401 U.S. at 127-28 n. 17.

The importance of a dependable, secure stream of revenue to local governments has led to the requirement in Illinois, as in many other states, of real estate tax prepayment with litigation of disputes postponed by law to a later stage in the collection cycle. The reasons for

the statutory prepayment requirement in Illinois are rooted in the economic depression of the 1930's, as set forth in *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E. 2d 299 (1973):

> Prior to 1933 a taxpayer had no means of recovering a tax which had not been paid under duress. There was also no requirement that the tax be paid before an objection to the application for judgment could be made. We learn from *People ex rel. Sweitzer v. Orrington Co.*, 360 Ill. 289, 293, that during the financial depression of those years taxpayers, in order to delay payment of real estate taxes, would not pay their taxes and would file objections to the application for judgment. The great number of taxpayers following this procedure delayed adjudication of the objections and severely impaired the collection of taxes and thus the functions of governmental units.

Clarendon, 56 Ill. 2d at 106, 306 N.E.2d at 302.

Furthermore, while delay for its own sake can be a strategic inducement for a taxpayer to seek an injunction, any tax injunction also transfers the risk of taxpayer insolvency to the government, as noted above by Mr. Justice Brennan in his *Perez* concurrence, 401 U.S. at 127 n. 17. Where equity law is not precise, and where comity and federalism interests are intertwined, it is not an easy matter for states to prevent taxpayer manipulation of existing law to stall tax payments, a phenomenon noted above in *Clarendon*, 56 Ill. 2d at 106, 306 N.E.2d at 302.*

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* This Court has noted: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity." [*State Railroad Tax Cases*, 92 U.S. 575, 616-17 [1875).]

A notorious example of such tax avoidance exists here in the Seventh Circuit with regard to a downtown Chicago property located at 28 East Jackson Street. As described by Mr. Justice Downing in *28 East Jackson Enterprises v. Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978) 380 N.E. 2d 895, a taxpayer employed:

> [a] series of cases in both the State and Federal courts by which plaintiff has avoided entirely the payment of real estate taxes on the subject property since 1971. The history of plaintiff's legal maneuvers is set forth in *28 East Jackson Enterprises, Inc. v. Rosewell* (1976), 65 Ill.2d 420, 358 N.E.2d 1139, in *28 East Jackson Enterprises, Inc. v. Cullerton* (7th Cir. 1975), 523 F.2d 439, and in *28 East Jackson Enterprises, Inc. v. Cullerton* (7th Cir. 1977), 551 F.2d 1093, and will not be repeated here.
>
> It is sufficient here to say that these maneuvers suggest a pattern whereby plaintiff has taken advantage of an unresolved question of Illinois law, a gray area of Federal-State relations, and the delays inherent in the judicial process to delay the sale of its tax-delinquent property until after the following year's taxes have also become delinquent, after which a new suit is filed raising the same precise issues and beginning the process anew.

28 East Jackson, supra, 63 Ill. App. 3d at 881-82, 380 N.E. 2d at 896.

Having delayed the payment of more than $700,000 in real estate taxes for more than eight years, the taxpayer filed for a reorganization under Chapter 11 of the Bankruptcy Act in late 1979. See, *In the Matter of 28 East Jackson Enterprises, Inc., Debtor*. 79 B 39051, United States Bankruptcy Court, Northern District of Illinois, Eastern Division.

Tax injunction actions in the district court also threaten to bring the federal court into an embarrassing

conflict with the state court on the federal questions which are often intertwined with state law issues. Thus in the *28 East Jackson* litigation referred to above, the inter-court conflict reached the point where Mr. Justice Walter V. Schaefer, speaking for the Illinois Supreme Court, observed that "as this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court." *28 East Jackson Enterprises, Inc. v. Rosewell*, 65 Ill. 2d 420, 425, 358 N.E. 2d 1139, 1142 (1976).

The foregoing underscores the risk that federal intervention herein "can readily be interpreted as 'reflecting negatively upon the state courts' ability to enforce constitutional principles.' *Steffel v. Thompson*, 415 U.S. at 462." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

In order to protect these vital interests this Court, prior to the adoption of § 1341, and Congress thereafter, has limited federal jurisdiction in tax cases to those where ". . . an asserted federal right might otherwise be lost." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

It is in this context that the collector presents his arguments that § 1343(3) jurisdiction is lacking in this case, that the principles underlying *Trainor v. Hernandez*, 431 U.S. 434 (1977) authorize a state § 1983 action, and that the Illinois prepayment remedy provides the taxpayer herein with a plain, speedy, and efficient remedy under the Tax Injunction Act of 1937.

I.

THE DISTRICT COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1343(3) TO ENTERTAIN CASES INVOLVING CONSTITUTIONAL CHALLENGES TO THE COLLECTION OF STATE TAXES.

The taxpayer's complaint relied solely upon 28 U.S.C. § 1343(3) as the basis for federal jurisdiction in the case. (See Complt. par. 3, A. 3) The collector asserted by motion to dismiss that actions involving state tax assessments do not fall within the purview of 28 U.S.C. § 1343 and 42 U.S.C. § 1983. (A. 11). It also appears that the taxpayer's allegations of "tax discrimination" find no support in this Court's Fourteenth Amendment cases. If the collector is correct in these contentions then the taxpayer's suit must fail for lack of jurisdiction.

In *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) the Court was confronted with a significant jurisdictional issue not raised by the parties. Deciding the issue, the Court stated " '. . . it is the duty of this court to see to it that the jurisdiction of the [District Court], which is defined by statute, is not exceeded.' " *City of Kenosha*, 412 U.S. at 511, citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

The jurisdictional issue presented in this argument was raised in the district court by the collector's Motion to Dismiss. (Mo. Dis. par. 1, A. 11-12).

The district court granted the collector's Motion to Dismiss but premised its reasoning solely upon the Tax Injunction Act of 1937. (Pet. App. B at 20a-21a). The issues argued in the court of appeals were solely those in support of the district court's ruling that jurisdiction was precluded by § 1341.

The collector submits that review of the § 1343(3) jurisdictional question is warranted by cases which, like *City of Kenosha,** support the power of the Court to rule on jurisdictional issues. Additionally, judicial economy will be well served because the § 1343(3) jurisdictional issue is bound to recur in two contexts. First, unless the Court decides the issue here, that issue can be presented again below in the cause on remand. In that event the district court will necessarily have to decide whether to follow *Czajkowski v. State of Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), *aff'd. unpublished order*, 588 F. 2d 839 (7th Cir. 1978). Second, when the Illinois courts look to federal law, as they must, in order to determine the jurisdictional ambit of state § 1983 actions they will be confronted with the clear language of *Czajkowski* affirmed by the Seventh Circuit that "constitutional challenges to the collection or validity of state taxes form a special class of cases which fall outside the jurisdictional parameters of 28 U.S.C. § 1343(3)." *Czajkowski, supra,*** at 1277. Viewed in this light the collector suggests that the jurisdictional issue is a "subsidiary question fairly comprised" within the question whether state § 1983 actions provide taxpayers a plain, speedy and efficient remedy under the Tax Injunction Act. *See*

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* *See Juidice v. Vail*, 430 U.S. 327, 331-33 (1977); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-37 (1962); *Guiterrez v. Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963).

** The action of the Seventh Circuit in affirming *Czajkowski* by an unpublished order rather than a published opinion signifies that the issues therein are fairly well settled. See Rules of the United States Court of Appeals for the Seventh Circuit, effective July 1, 1976; Article III, Circuit Rule 35, (c), (1) and (2). The state courts will necessarily attach significance to this fact as it bears on the precedential value of the district court opinion. Moreover on April 11, 1980 the Seventh Circuit denied a motion to order publication of the opinion. See *Czajkowski v. State of Illinois*, 78-1213 (7th Circuit), order, April 11, 1980.

S. Ct. Rule 23(1)(c); Pet. at 2. Petitioners' Argument II at 29-37.

For the foregoing reasons the § 1343(3) jurisdictional question is properly before the Court and should be decided.

In *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972) the Court clearly decided that the limits of jurisdiction under 28 U.S.C. § 1343(3) were not set by distinguishing personal liberties from property rights. However, the Court did not overrule *Carter v. Greenhow*, 114 U.S. 317 (1884), *Pleasants v. Greenhow*, 114 U.S. 323 (1884) and *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900), but rather distinguished the denial of jurisdiction therein as ". . . consistent with congressional restrictions of federal jurisdiction in this special class of cases, and with longstanding judicial policy." *Lynch*, 405 U.S. at 542-3, n.6. There is no question that this distinguished trio of cases was decided long before the passage of the Tax Injunction Act of 1937, and directly foreclosed federal jurisdiction in state revenue cases.*

Those cases, and the Court's treatment of them in *Lynch* were held by the district court in *Czajkowski v. State of Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977) to exclude § 1343(3) jurisdiction in tax cases. District Judge Prentice H. Marshall held as follows:

> . . . we discern a more fundamental defect with plaintiffs' § 1983 claims. We find that constitutional

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* *Holt* noted that the lineal parents of § 1343(3), referred ". . . to civil rights only, and are inapplicable here." *Holt*, 176 U.S. at 72. The Court accordingly ruled that, though federal question jurisdiction was asserted, the jurisdictional amount was not pleaded, and therefore reversed the lower court. In the case at bar no claim is premised on Federal Question Jurisdiction under 28 U.S.C. § 1331.

> challenges to the collection or validity of state taxes form a special class of cases which fall outside the jurisdictional parameters of 28 U.S.C. § 1343(3). Because § 1343(3) is the "jurisdictional counterpart" to civil rights actions under § 1983, and because "both sections are construed identically," *Lynch v. Household Finance*, 405 U.S. 538, 543 n. 7, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972), the inapplicability of § 1343(3) is automatically fatal to plaintiffs' § 1983 claims.

Czajkowski, 460 F. Supp. at 1277.

After an extended discussion of *Hague v. C. I. O.*, 307 U.S. 496 (1939) and the tax cases set out in *Lynch*, 405 U.S. at 542-3, n.6, Judge Marshall concluded that:

> The Supreme Court's reaffirmation of the results of those decisions in *Lynch* convinces us that § 1343(3) may still be applied as an independent ground for declining jurisdiction over constitutional challenges to the collection of state taxes, even absent a clear bar under § 1341. Therefore, we conclude that plaintiffs' § 1983 claims fail for want of a jurisdictional basis under § 1343(3). See Note, 24 Stanford L. Rev. 1134 (1972); Note, 86 Harv. L. Rev. 201 (1972).

Czajkowski, 560 F. Supp. at 1279. As we have noted earlier the Seventh Circuit affirmed by an unpublished order. It is respectfully submitted that *Czajkowski* supports the refusal of the district court to take jurisdiction of the case.

In any event, the taxpayer's complaint falls short of pleading a Fourteenth Amendment violation. First, the allegations of the taxpayer's complaint, even read most favorably to her, fail to allege purposeful or intentional discrimination as required by *Snowden v. Hughes*, 321 U.S. 1 (1944). Second, as a matter of substance, the complaint fails to assert facts which have been held to

violate either the due process clause or the equal protection clause of the Fourteenth Amendment.

Snowden requires that pleadings alleging violation of rights allegedly protected by the Fourteenth Amendment must assert "intentional or purposeful discrimination between persons or classes." *Snowden*, 321 U.S. at 7. See also *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F. 2d 439, 440-41, n.2 (7th Cir. 1975). It is submitted that the taxpayer's complaint merely alleges general conclusions of "egregious disparities" in assessments without any specific allegation as to the wrongful intent or malicious purpose behind the tax assessments. In fact, if, throughout the taxpayer's complaint, one were to substitute the word "overassessment" for "discrimination", it becomes clear that the taxpayer has simply equated the two terms. Under the taxpayer's theory every overassessment would be a violation of the Fourteenth Amendment, because the overassessed taxpayer is treated differently from the rest of those in her class who are correctly assessed. The deficiency of the taxpayer's allegation can be seen by reference to paragraphs of her complaint (A. 9) where it is alleged:

> Requiring plaintiff to pay taxes upon her property in 3½ times the lawful amount and the amount at which property in the same class generally is assessed deprives her of rights of equal protection and due process secured to her under the 14th Amendment and Article I, § 2 of the Illinois Constitution. It further deprives her of rights of uniformity in taxation secured to her under Article IX, § 4 of the State Constitution and under the Revenue Act.

It is first apparent that this allegation does not charge a suspect classification, or, for that matter, any

classification but that between the "lawfully assessed" and the "overassessed". There is simply no allegation that the assessor placed the taxpayer in a separate, differently treated class based on the taxpayer's race, sex, political affiliation, national origin or any other attribute.

Second, the allegation charges no purpose or intent which might infuse the assessment with unconstitutionality. Lack of such substantive allegations leads to the anomaly recognized in *Snowden* where the Court observed that "a construction of the equal protection clause which would find a violation of federal right in every departure by state officials from state law is not favored." *Snowden*, 321 U.S. at 11-12.

Finally, it is clear that the numerous acts within the assessment process of a county are done intentionally and systematically. Short of the Internal Revenue Service, there are not many systems better organized and designed to run according to settled rules than real estate tax collection systems. But that sort of intent and systemization is not, we think, what is meant in *Snowden*. As the Court observed:

> It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute.

Snowden, 321 U.S. at 9.

The cases which the Court cited in support of the proposition are highly instructive. Of the nine cases cited in the text and accompanying footnote, six dealt with railroads, two with iron or coal companies, and one with a railroad bridge, all of which were very aggressively taxed by the states during the last quarter of the 19th century and even into the early 1900's. More importantly, all those cases deal with fact situations where, contrary to the state constitution, other property (usually residential and light commercial real estate) were substantially undervalued, while the railroad, or bridge company, or steel mill was assessed at "full value".* The case at bar does not present that fact situation at all. Instead only overvaluation is asserted. It is submitted that the complaint fails to charge intentional undervaluation of the type which was historically remedied in the "railroad" cases. To hold that a constitutional claim arises from these allegations surely

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* In the slightly different context of state taxation of national banks, which has generated its own body of tax equivalency law [see e.g., *Michigan National Bank v. State of Michigan*, 365 U.S. 467 (1961) and *Bancorporation v. Korzen*, 64 Ill. 2d 200, 355 N.E.2d 31 (1976)] the court has held in *Cummings v. National Bank*, 101 U.S. 153 (1879) ". . . when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, . . . equity may properly interfere to restrain the operation of this unconstitutional exercise of power." *Cummings*, 101 U.S. at 157-58. The importance of this problem, often called valuation debasement, has diminished generally as governmental revenues have come to be generated more and more through excise and income taxation rather than *ad valorem* property taxation. Illinois solved much of its problem in this area by abolishing the personal property tax, 1870 Const. Amendment IX-A (adopted November 25, 1970), and adopting, in 1970, constitutional provisions allowing classification of property for the purposes of taxation. Art. IX, Section 4, Ill. Const. 1970.

would trivialize the lofty protections of the Fourteenth Amendment's equal protection clause in a manner rejected in *Snowden.* See 321 U.S. at 11-12 (Stone, J. for the Court), and at 16-17 (Frankfurter, J. concurring).

The few modern § 1983 cases in this area support the proposition that something more than overvaluation of property is necessary to violate the taxpayer's equal protection rights under the Federal Constitution. Thus *Garrett v. Bamford,* 538 F. 2d 63 (3rd Cir. 1976) holds that allegations of intentional racial discrimination state a claim under § 1983 and the Fourteenth Amendment. The relief sought in *Garrett* was ". . . an injunction requiring defendants immediately to cause the assessment of all residential property within the County on a non-discriminatory basis, and to make an annual assessment with proofs submitted to the court to demonstrate that the assessment is uniform and non-discriminatory." *Garrett,* 538 F. 2d at 65-66.

The complaint in the case at bar fails, however, to allege that the assessment of taxpayer's property was tainted by racially discriminatory intent,* and only requests relief directed towards an adjudication of the correct valuation of the subject property. Similarly *Weissinger v. Boswell,* 330 F. Supp. 615 (N.D. Ala. 1971) dealt with allegations of wide spread lack of uniformity in Alabama on a statewide basis. No such allegations are made in the complaint at bar.

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* The allegation of paragraph 11 of the taxpayer's complaint that "disparities in overassessment . . . are far greater in number and size in older inner city and county areas owned, inhabited or used to a larger extent by minorities and poorer people" (A. 7) surely fails the specificity tests of *Washington v. Davis,* 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977).

Fulton Market Cold Storage Co. v. Cullerton, 582 F. 2d 1071 (7th Cir. 1978) held that allegations that defendant tax officials ". . . systematically, knowingly, intentionally, fraudulently and invidiously assessed . . . property at levels other than permitted by law, and greatly in excess of the levels at which property in Cook County was generally assessed. . . ." stated a claim under 42 U.S.C. § 1983. *Fulton*, 582 F. 2d at 1073. That court however, did not set out or analyze the constitutional underpinnings of the holding because the only question presented therein was whether § 1341 barred an action for damages premised on 42 U.S.C. § 1983.

It is submitted that the complaint has failed to allege facts sufficient to state a violation of Fourteenth Amendment equal protection rights. Moreover, it would seem that the taxpayer's allegations that she is assessed 3½ times higher than the law allows smacks more of a denial of due process, than of equal protection. However, the case of *McGovern v. New York*, 229 U.S. 363 (1913) holds that due process is not denied where there is a mistaken or erroneous valuation of property taken for public use. Similarly it seems clear that, given the broad range of administrative and legal remedies available in Illinois, the taxpayer was, and will be, accorded both the substantive and procedural process which was her due in the assessment of her real estate. *Weyerhaueser v. Minnesota*, 176 U.S. 550, 555-56 (1900); *Security Trust v. Lexington*, 203 U.S. 323, 333-34 (1906). That she was unsuccessful in convincing the assessor of her notion of the property's value does not, without much more, warrant intrusion by the federal court into the state remedies which are designed to assure tax uniformity.

It is therefore submitted that the foregoing fully supports the refusal of the district court to take jurisdiction of the case.

II.

THE RIGHT OF THE TAXPAYER TO CHALLENGE HER REAL ESTATE TAX ASSESSMENT BY A § 1983 ACTION IN ILLINOIS COURTS PRECLUDES FEDERAL JURISDICTION.

Illinois law is clear that a civil rights action pursuant to 42 U.S.C. § 1983 may be maintained in Illinois courts. *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295 (1st Dist. 1974), 323 N.E. 2d 110, 113-114; *Bohacs v. Reid*, 63 Ill. App. 3d 477, 481-82 (2nd Dist. 1978), 379 N.E. 2d 1372, 1375. In fact, the Appellate Court in *Alberty* straightforwardly rejected *Chamberlain v. Brown*, 442 S.W. 2d 248 (Tenn. 1969) the only case, so far as we can find, which has refused to acknowledge concurrent state court jurisdiction of actions premised upon the Civil Rights Act. See *Alberty, supra*, at 295. *Alberty* is settled law in the First Appellate District of Illinois, and is binding upon the Circuit Court of Cook County, Illinois, the state forum which would have venue and jurisdiction of a state § 1983 tax action in this case.

In fact, every state court which has considered the question, except Tennessee's, has permitted § 1983 actions to go forward. *See*, Arizona—*New Times, Inc. v. Arizona Bd. of Regents*, 20 Ariz. App. 422, 513 P. 2d 960 (1973); California—*Brown v. Pitchess*, 13 Cal. 3d 518, 531 P. 2d 772 (1975); *Martinez v. California*, 85 Cal. App. 3d 430, 149 Cal. Rptr. 519, (1978) *aff'd. Martinez v. State of Cal.*, ... U.S. ....., 100 S. Ct. 553 (1980); Massachusetts—*Rzeznik v. Chief of Police*, 373 N.E. 2d 1128 (1978); Michigan—*Dudley v. Bell*, 50 Mich. App. 678, 213 N.W. 2d 805 (1973); New York—*Holt v. Troy*, 78 Misc. 2d 9, 355 N.Y.S. 2d 94 (1974); New Mexico—*Gomez v. Board of Ed. of Dulce Ind. Sch. Dist. No. 21*, 85 N.M. 708, 516 P. 2d 679 (1973); North Carolina—*Williams v. Green*, 36 N.C. App. 80, 243 S.E. 2d 156 (N.C. 1978); Wisconsin—

Terry v. Kolski, 78 Wisc. 2d 693, 254 N.W. 2d 704 (Wisc. 1977).

Three federal district courts have ruled that the availability of a § 1983 action in state court provides a plain, speedy and efficient state court remedy under § 1341, thereby precluding federal jurisdiction. *Advertiser Co. v. Wallace*, 446 F. Supp. 677 (M.D. Ala. 1978); *Green v. Klinkofe*, 422 F. Supp. 1021 (N.D. Ind. 1976); *Horn v. O'Chesky*, 378 F. Supp. 1280 (D.N.M. 1974). See also, generally *Long v. District of Columbia*, 469 F. 2d 927 (D.C. Cir. 1972).

Most recently, and subsequent to the opinion of the court below, this Court reviewed a § 1983 state court ruling in *Martinez v. State of California*, ... U.S. ....., 100 S. Ct. 553 (1980), where the California court had assumed jurisdiction of both state claims and federal § 1983 claims against the state arising from a parolee's murder of a girl. Mr. Justice Stevens, writing for the Court noted:

> [T]he California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule where
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> "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." *Testa v. Katt*, 330 U.S. 386, 391, 67 S. Ct. 810, 813, 91 L. Ed. 967, quoting *Claflin v. Houseman*, 93 U.S. 130, 137, 23 L. Ed. 833.

Martinez, 100 S. Ct. at 558 n. 7.

We submit that Illinois clearly has the power to choose, and, in *Alberty*, has chosen to permit actions

asserting federal § 1983 claims to be brought in her courts. The Illinois rule in *Alberty* accords with the overwhelming majority of cases reaching the issue, and that rule is therefore settled, certain, plain and clear within the most strict reading of § 1341.

However, the court below found the § 1983 remedy "less than plain" because of ". . . the doubt whether an Illinois Court would apply federal equity law instead of the Illinois rule against interest on tax refunds." 604 F. 2d at 537-38. There should, however, be no doubt that federal equity law must apply to federal § 1983 claims in state courts. Indeed in *Martinez* the Court observed that:

> "It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts.

Martinez, 100 S. Ct. at 558.

Moreover, the Supremacy clause of the Federal constitution binds the state courts in their adjudication of federal rights. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-39 (1969). In any event, this Court will have the final decision on the state court treatment of the § 1983 federal claims, just as it did in *Martinez*.

Illinois courts have the full authority, by the state constitution, to give injunctive relief in tax assessment cases, and there is no reason to believe that injunctive relief would not be made available to a taxpayer who alleged deprivation of a federal right sought to be remedied by the state § 1983 action. This is not to say that the decision of the state court as to whether federal equity law requires pre-judgment interest on tax refunds will necessarily accord with the opinion of the court below. Furthermore, as in *Martinez*, the state

court may say that no deprivation of a federal right exists at all. Then, in our view, it is up to the Court to review the decision of the state tribunal.

What the court below incorrectly achieved was a complete finesse of the Illinois courts on this issue. If § 1341 means anything, it must mean at the very least that the state court be given the chance to rule upon the precise question which the taxpayer, by her federal action herein, seeks to withdraw from it. This Court's rule in *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) that:

> A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost.

clearly requires that the state court be permitted to rule upon the claims asserted in federal court.

However, the court below ruled, as a matter of principle, that:

> Reading the Tax Injunction Act to bar federal court jurisdiction on the basis of the possibility of bringing a federal cause under Section 1983 in state court leads to an untenable conclusion; the Tax Injunction Act would bar federal jurisdiction in all cases involving state tax operations—without exception.

LaSalle, 604 F. 2d at 538.

The collector first submits that this conclusion is analytically wrong because diversity cases under 28 U.S.C. § 1332 obviously will be unaffected by a state's acceptance of jurisdiction of a federal § 1983 claim. Diverse plaintiffs who desire to challenge state tax operations on state grounds are, of course, entitled to proceed in federal court if state remedies are not plain, speedy and efficient within the meaning of the Tax Injunction Act. In-

deed, the initial thrust to enact the Tax Injunction Act appears to have been provided by complaints that diverse foreign corporations were tying up state taxes in federal court,

> and all the time in this dispute there is no federal question involved. There is a dispute arising under a State Statute or law of other origin and nothing more.

81 Cong. Rec. 1417 (1937) (Remarks of Sen. Bone). See also, *Garrett v. Bamford*, 538 F. 2d 63, 66-67 (3rd Cir. 1976); *Tramel v. Schrader*, 505 F. 2d 1310, 1316 (5th Cir. 1975); *Hargrave v. McKinney*, 413 F. 2d 320, 325 (5th Cir. 1969); *Fulton Market Cold Storage Co. v. Cullerton*, 582 F. 2d 1071, 1074-75 (7th Cir. 1978).

Secondly, the theory of concurrent jurisdiction, by which a state court may entertain a federal cause of action based on § 1983, surely cannot supply a basis for state jurisdiction of a diversity case filed in federal court under § 1332. To so hold would thwart completely the protections which congress has granted to potential out-of-state plaintiffs. It thus follows that diversity jurisdiction is wholly unaffected by a state court's willingness to entertain federal claims under section 1983.*

Until the scope of the civil rights jurisdiction had been expanded by *Monroe v. Pape*, 365 U.S. 167 (1961) and *Lynch v. Household Finance Corporation*, 405 U.S. 538

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* In *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) the Seventh Circuit held that a damage action premised upon 42 U.S.C. § 1983 was not so intrusive as to be barred by the Tax Injunction Act. Taxpayers who consider themselves aggrieved by tax officials' actions thus have an available federal damage remedy, one which puts far less pressure on the system than anticipatory litigation.

(1972) the Tax Injunction Act operated primarily as a limitation on the federal question jurisdiction of 28 U.S.C. § 1331, and the diversity jurisdiction of 28 U.S.C. § 1332. *See* P. Bator, P. Mishkin, D. Shapiro, and J. Wechsler, Hart & Wechsler's, The Federal Courts and the Federal System, 947-950 (2nd Ed. 1973); Note, 24 Stanford L. Rev. 1134, 1141-42 (1972).

Therefore, the attempt by the court below to show that the collector's argument herein is overinclusive falls of its own weight. Properly understood and articulated, the collector's argument is that a state § 1983 action is consistent not only with the policy of § 1983, which is effective vindication of federal rights, but also with the policy behind § 1341, which is the prevention of intrusive federal litigation into state tax collections. Furthermore the principles laid down recently by this Court in *Trainor v. Hernandez*, 431 U.S. 434 (1977) tilt the balance, if such need be struck, in favor of preclusion of anticipatory federal jurisdiction so long as state taxes are, as here, in collection.

This Court's line of cases from *Younger v. Harris*, 401 U.S. 37 (1971) through *Trainor v. Hernandez*, 431 U.S. 434 (1977) weigh against the intrusion of the court below into the sensitive area of state taxation. A proper respect for the courts and the tax agencies of Illinois counsels against a direct federal intrusion into the tax collection system, particularly where a federal damage action and a state § 1983 action are each available to an aggrieved taxpayer.

It must be remembered that the tax collection procedure in Illinois is a law suit instituted by the county collector at the end of the tax year when it has been determined which properties are delinquent. The collector's application for judgment and order of sale is

precisely the state court lawsuit which a federal tax injunction will forestall. There is no question that all federal and state questions can be raised as objections to the collector's Application. Illinois courts regularly decide both state and federal claims in administering the legal remedy which the taxpayer here seeks to avoid. See *LaSalle Nat. Bank v. County of Cook*, 57 Ill. 2d 318, 324, 312 N.E. 2d 252, 255 (1974) ("the legal remedy by way of payment under protest followed by objections to the application for judgment for delinquent taxes provides an adequate remedy at law wherein the alleged irregularities and violations of plaintiff's constitutional rights may be litigated and, if warranted, relief granted.") In view of Illinois' position on § 1983 actions in state courts, it is hard to see how an asserted federal right will be lost in a state court § 1983 action.

The opinion of the court below runs afoul of important *Younger* comity principles in two respects: First, the principles of federalism, comity and equitable restraint of federal power expressed in *Younger* and reaffirmed in *Trainor* apply as well to cases involving state taxes as they do to other vital state court proceedings. There is no reason to read the congressional enactment of the Tax Injunction Act of 1937 as a limitation on those principles. This is so because the policy behind *Younger* abstention and § 1341 is based on the intrusion into state affairs authorized in *Ex parte Young*, 209 U.S. 123 (1908). If anything, § 1341 is a direct signal to the federal courts of the wide berth to be given the states when it comes to enjoining tax collections. Mr. Justice Stevens' objection in his *Trainor* dissent that the Court is "fashioning a non-statutory abstention doctrine which requires even greater deference to the State as an ordinary litigant than Congress regarded as appropriate for the State's more basic fiscal needs," *Trainor*, 431

U.S. at 466. (Stevens, J. dissenting), clearly articulates the restrictive approach to § 1341 interpretation which was impliedly rejected by the majority in *Trainor*.

It is submitted that Illinois' tax collection system is, under *Trainor*, entitled to at least as much protection as was its welfare loss recoupment program. Thus it is necessary for the Court to determine whether the allegations of the taxpayer's complaint herein allege the sort of grounds which bear up under *Younger* scrutiny.

It is clear, however, that the complaint fails to assert claims of irreparable injury which are "great and immediate," or that the tax collection statute is "flagrantly and patently violative of express constitutional prohibitions." *Younger*, 40 U.S. at 53. This point is underscored by the availability to the taxpayer of a federal § 1983 damage action recently approved by the Seventh Circuit. *Fulton Market Cold Storage Co. v. Cullerton*, 582 F. 2d 1071 (1978).

If comity means avoiding the unseemly tug of war between two courts of coordinate jurisdiction over a given case and avoidance of the concomitant risk of conflicting judgments, then the collector's argument accords with even the most strict notion of the term. If federalism acknowledges that the Constitution has established state courts as fully competent adjudicators of federal questions and protectors of federal rights, then the collector's arguments herein foster it. If traditional federal equity abhors undue delay, interruption and confusion in the state's administration of its tax system, then the collector's arguments follow that law. It is, therefore, respectfully submitted that the court below incorrectly held that the availability of a § 1983 action in state court fails to bar federal jurisdiction under § 1341.

III.

THE ILLINOIS STATUTORY REAL ESTATE TAX REMEDY, WHICH DENIES PRE-JUDGMENT INTEREST, IS PLAIN, SPEEDY, AND EFFICIENT WITHIN THE MEANING OF THE TAX INJUNCTION ACT OF 1937.

A.

The Illinois Statutory Remedy.

The Illinois statutory remedy applicable in Cook County for challenging allegedly excessive real estate tax assessments and taxes provides as follows: The taxpayer is initially afforded the opportunity to challenge an assessment by filing a complaint with the Assessor. (See Ill. Rev. Stat. 1977, ch. 120, sec. 578, Br. Ap. 1a) If unsatisfied with the assessor's assessment, the taxpayer is provided with the opportunity to file a complaint with the board of appeals. (See Ill. Rev. Stat. 1977, ch. 120, sec. 594(1), Br. Ap. 2a) If the taxpayer desires to further challenge the assessment, he is required to first pay the taxes based on the challenged assessment under protest and file an objection to the collector's annual Application for Judgment. (See Ill. Rev. Stat. 1977, ch. 120, secs. 675 and 716, Br. Ap. 2a, 5a) In Cook County the tax bills are sent in two installments. The first installment for a particular tax year is equal to one-half the previous year's tax and is due, by statute, on March 1 of the year following the tax year in question. The second installment is due, by statute, on August 1 of the year following the tax year in question. (Ill. Rev. Stat. 1977, ch. 120, sec. 705.1) Thereafter, in October or later, by statute, the collector makes his annual Application for Judgment. (See Ill. Rev. Stat. 1977, ch. 120, sec. 710, Br. Ap. 5a) It is at this statutory proceeding where the taxpayer may file a "specific objection" and obtain a

judicial determination as to any issue. *Andrews v. Foxworthy*, 71 Ill. 2d 13, 373 N.E. 2d 1332 (1978); *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E. 2d 299 (1973). Within 90 days after the filing of an objection, the trial court is to hold a conference with the taxpayer's counsel and the collector's counsel. If a settlement cannot be reached, either party may request a hearing to be held within 90 days of the request for said hearing. If the taxpayer is entitled to a refund, the court enters an order refunding the appropriate amount of tax paid. (See Ill. Rev. Stat. 1977, ch. 120, sec. 716, Br. Ap. 5a)

The particular aspect of the Illinois statutory remedy that the taxpayer in the case at bar believes to render the statutory remedy not to be "plain, speedy and efficient" is the Illinois supreme court's holding, in *Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415, 167 N.E. 2d 236 (1960), that refunds are to be made without awarding interest for the time the taxpayer does not have the use of the refunded tax payment. In *Lakefront* the taxpayer brought an equity action claiming an excessive real estate tax and that the Illinois statutory remedy at law was inadequate because no interest was awarded on refunds.* The court reviewed the pertinent federal and state precedents presented to it and held that the taxpayer was not legally entitled to prejudgment interest on a refund. The court stated:

> "We are of the opinion that the latter view [that pre-judgment interest is not to be awarded on tax refunds in the absence of a statute expressly providing for interest] is the only view compatible with the statutory system which provides for the appropriation, levy, collection and disbursement of

* The equity action was not brought pursuant to 42 U.S.C. § 1983, and the taxpayer made no claim that the denial of interest violated due process.

> taxes in this state, and we think too, as other courts have pointed out, (*Kaemmerling v. State*, 81 N.H. 405, 128 Atl. 6; *Schlesinger v. State*, 195 Wis. 366, 218 N.W. 440), that the silence of our refund statute on the question of interest discloses a legislative intention to deny it. Accordingly, we conclude that plaintiff is not entitled to interest in the absence of a statute imposing that liability. This being so, the failure of the statutory remedy to provide for the recovery of interest is no measure of its adequacy or inadequacy."

Lakefront, 19 Ill. 2d at 423, 167 N.E. 2d at 241.

B.

Pre-Judgment Interest On Tax Refunds Is Not Required To Make A State Court Remedy Plain, Speedy And Efficient Because Pre-Judgment Interest Is Not Held To Be An Element Of Recoverable Damages In Tax Overassessment Cases.

This Court most recently explained the federal district court's duty to refrain from issuing tax injunctions against the collection of state and local taxes in *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976):

> A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost.

Tully, 429 U.S. at 73. This has been the federal equity rule over the years. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909),* *Matthews v. Rodgers*, 284 U.S. 521 (1932).

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* In reversing a district court tax injunction, this Court stated: "An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the

(Footnote continued on following page)

Moreover, this Court has interpreted the Tax Injunction Act, 28 U.S.C. § 1341, as being a congressional confirmation of the Court's prior federal equity practice in the area of state and local taxation:

> This policy of restraint has long been reflected and confirmed in the congressional command of 28 U.S.C. § 1341 that no injunction may issue against the collection of a state tax where state law provides a 'plain, speedy and efficient remedy.'

Tully, 429 U.S. at 73. Thus, the Tax Injunction Act has not been interpreted to have created new rights, but rather it has been interpreted to sanction existing law. Accordingly, as the court below noted (604 F. 2d at 533) in the case at bar, the test of whether or not a state court remedy to challenge state taxes is "adequate" so as to bar federal anticipatory relief, is the same as the test to determine whether or not the state remedy is "plain, speedy and efficient" under 28 U.S.C. § 1341. The two terms may be used interchangeably. This point is important because the law prior to the passage of 28 U.S.C. § 1341, in 1937, will then be instructive as to whether a state remedy is "plain, speedy and efficient."

Since the taxpayer challenges Illinois' denial of pre-judgment interest as being inadequate, the taxpayer has necessarily created the issue of whether or not pre-judgment interest on tax refunds is an element of damages in overassessment cases. If pre-judgment interest is not generally awarded as an element of damages in overassessment cases in the absence of a statute so directing, then it would be difficult to see the

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* *continued*
fiscal operations of the State governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." 213 U.S. at 282.

"inadequacy" of the Illinois statutory remedy. The taxpayer should not be permitted to obtain equity jurisdiction by claiming that the denial of pre-judgment interest on refunds renders the remedy at law "inadequate" if there is no common law or constitutional right to pre-judgment interest on tax refunds. The taxpayer should not be permitted to "beg the issue" or "put the cart before the horse."

We therefore submit that the importance of the following cases from nineteen state and territorial jurisdictions where the courts have held that pre-judgment interest on state and local tax refunds is not warranted if there is no statutory authorization for the pre-judgment interest, cannot be minimized:* California—*Southwest Land Co. v. Los Angeles County*, 46 Cal. App. 9, 188 P. 575 (1920); Colorado—*Antero & Lost Park Reservoir Co. v. Park County*, 75 Colo. 131, 225 P. 269 (1924); Connecticut—*Marsh v. Brown*, 31 Conn. Supp. 134, 325 A. 2d 466 (1974); Illinois—*Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415, 167 N.E. 2d 236 (1960); Iowa—*Crown Concrete Co. v. Conkling*, 247 Iowa 609, 75 N.W.

* The minority view is that pre-judgment interest on state and local tax refunds is due notwithstanding the lack of statutory authorization: Alaska—*Ketchikan Spruce Mills v. Dewey*, 17 Alaska 336 (Dist. Ct. 1957); Indiana—*Lake County v. Donch*, 6 Ind. App. 337, 33 N.E. 663 (1893); Massachusetts—*Boott Cotton Mills v. Lowell*, 159 Mass. 383, 34 N.E. 367 (1893) (interest on void taxes, but not on overassessments); Michigan—*Standard Oil Co. v. State*, 283 Mich. 85, 276 N.W. 908 (1937); Montana—*Williams v. Harvey*, 91 Mont. 168, 6 P.2d 418 (1931); New York—*Brodsky v. Murphy*, 25 N.Y.2d 518, 255 N.E.2d 700 (1969) (interest on unconstitutional and void taxes, but not on overassessments); Pennsylvania—*Cities Service Oil Co. v. Pittsburgh*, 449 Pa. 481, 297 A. 2d 466 (1972); South Dakota—*Chicago, St. Paul, M. & O. Ry. v. Mundt*, 56 S.D. 530, 229 N.W. 394 (1930); Florida—*City of Opa-Locka v. Buckress Land Co.*, 247 So. 2d 339 (1971); Nevada—*Washoe Investment, Inc. v. State*, 532 P. 2d 265 (1975).

2d 351 (1956); Kansas—*Jackson County v. Kaul*, 77 Kan. 717, 96 P. 45 (1908); Massachusetts—*Boott Cotton Mills v. Lowell*, 159 Mass. 383, 34 N.E. 367 (1893); (no interest on overassessments, but interest on void assessments); Mississippi—*Gulf, Mobile and Ohio Ry. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943); New Jersey—*Hahne Realty Corp. v. Newark*, 119 N.J.L. 12, 194 A. 191 (1937); New York—*Brodsky v. Murphy*, 25 N.Y. 2d 518, 255 N.E. 2d 700 (1969) (no interest as to excessive taxes, but interest as to unconstitutional and void taxes); North Carolina—*Cannon v. Maxwell*, 205 N.C. 420, 171 S.E. 624 (1933); North Dakota—*Ford Motor Co. v. Baker*, 71 N.D. 298, 300 N.W. 435 (1941); Ohio—*Early S. Daniel Co. v. Cincinnati*, 53 Ohio App. 397, 5 N.E. 2d 409 (1935); Oklahoma—*Eaton v. St. Louis-San Francisco Ry.*, 122 Okla. 143, 251 P. 1032 (1925); Puerto Rico—*Fajardo Sugar Co. v. Richardson*, 7 Puerto Rico F. 154 (D.C. P.R. 1914); Rhode Island—*Daniels Tobacco Co. v. Norberg*, 335 A. 2d 636 (R.I. 1975); Tennessee—*New England Mutual Life Insurance Co. v. Reece*, 169 Tenn. 84, 83 S.W. 2d 238 (1935); Virginia—*Commonwealth v. Safe Deposit & Trust Co.*, 155 Va. 458, 155 S.E. 897 (1930); Wisconsin—*Schlesinger v. State*, 195 Wisc. 366, 218 N.W. 440 (Wisc. 1928).

The one thread which links virtually all of these cases is the *ratio* that since interest is a creature of statute, pre-judgment interest on a tax refund may be awarded only if the legislature has provided for it by statute. Moreover, this is the general rule which has been applied in the federal courts. For instance, in *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401 (W.D. Okla. 1934) the court held that a taxpayer who was entitled to a refund of local real estate taxes paid, was not entitled, in the

absence of statute, to pre-judgment interest from the local tax collecting authorities. The court stated:

> On the question of interest, the court appreciates the position of the defendant. Where taxes are paid, under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest from some other fund whose application had been provided by statute.

Comanche County, 6 F. Supp. at 413.

And, of course, the general rule is that the United States is not liable, in the absence of statute, for pre-judgment interest on federal income tax refunds.* For instance, in citing decisions of the Supreme Court, the First Circuit stated:

> . . . Interest against the government is only allowable as provided by statute. *Angarica v. Bayard*, 127 U.S. 251, 260, 8 S. Ct. 1156, 32 L. Ed. 159; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 49 S. Ct. 52, 73 L. Ed. 170. There is no fixed right to it. It depends on the law at the time when the claim is allowed by the department, or, if the claim is litigated, when the case is heard by the court. *Hind v. United States*, 41 F. 2d 892 (Ct. Cl.).

Bertelsen & Petersen Engineering Co. v. United States, 60 F. 2d 745, 748 (1st Cir. 1932). See also *Girard Trust Co. v. United States*, 270 U.S. 163 (1926).

Defendants also submit that the Illinois remedy has long been approved of as "adequate" and sufficiently

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* Note that *Erskine v. Arsdale*, 82 U.S. 75 (1872), dealing with jury instructions pertaining to interest, has been distinguished as not applying to taxes levied by state and local governments. See *United States v. Nez Perce County, Idaho*, 95 F 2d 238 (9th Cir. 1938) and cases cited therein.

"plain, speedy and efficient" to bar federal injunctive relief under 42 U.S.C. § 1341. In the leading case of *Matthews v. Rodgers*, 284 U.S. 521 (1932), the Court held:

> . . . But appellants [tax authorities] insist that the appellees are under no such constraint, either to expose themselves to the penalties for failure to pay the tax or to seek equitable relief against its collection, since each of them may pay the tax to the collecting officer under protest, and, under the laws of Mississippi, may maintain a suit at law for its recovery on the ground that it was exacted in violation of the Constitution of the United States. That such a procedure saves to the taxpayer his federal right, and, if available, will defeat the jurisdiction of federal courts to enjoin the collection of the tax, has long been the settled rule in this Court.

Matthews, 284 U.S. at 526.

Importantly, the Supreme Court, in an opinion delivered on the same day as *Matthews*, expressly held that the Illinois remedy for challenging an annual corporate franchise tax, which remedy provided for prepayment of the tax under protest and a remedy at law with no statutory provision for interest if the taxpayer prevailed, was adequate. *Stratton v. St. Louis Southwestern Ry. Co.*, 284 U.S. 530 (1932).

And in *Bland v. McHann*, 463 F. 2d 21 at 28 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973), the Fifth Circuit held that a state's failure to award interest with a tax refund did not render that state court remedy not "plain, speedy and efficient."

Accordingly, it is in this context that the Illinois Supreme Court followed both federal court decisions and the majority view of the states in holding, in *Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415, 167 N.E. 2d 236

(1960) that pre-judgment interest on tax refunds is not to be awarded in the absence of a statute so directing. Illinois law is clearly in accord with the general view of recovery of pre-judgment interest on tax refunds. See *Cooley on Taxation*, Vol. 3, § 1308 (1924), and 88 A.L.R. 2d 823.

Moreover, the majority common law rule does not conflict, we submit, with civil rights law of damages. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court, after concluding that the general principles of compensation are to apply to civil rights cases, stated:

> . . . In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action. See *Adickes v. S. H. Kress & Co.*, 398 U.S., at 231-232 (Brennan, J., concurring and dissenting).

Carey, 435 U.S. at 257-8.

Since taxpayers have for years been permitted to challenge allegedly excessive local taxation under the common law (i.e. not relying on the Equal Protection Clause or the Civil Rights Act), there is no reason not to apply the common law. In Illinois, for instance, the common law has long provided a remedy in cases which involve excessive real estate tax assessments. See *City of Chicago v. Burtice*, 24 Ill. 489 (1860). The three-pronged common law rule permitting relief has been recently stated in *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E. 2d 299 (1973), as follows:

> . . . Overvaluation may be so excessive, under some circumstances, as to justify the conclusion that it was not honestly made and is thus constructively fraudulent. [Citations.] Similarly, when property is

> assessed disproportionately higher than other similar property [Citation] or the assessed value is reached under circumstances showing either a lack of knowledge of known values or a deliberate fixing of values contrary to known value, fraud will be inferred. [Citation.] In such cases courts will grant relief.

Clarendon, 56 Ill. 2d at 104-105, 306 N.E. 2d at 301.

Other states also provide for challenges to allegedly excessive state and local taxation. See 84 C.J.S. Taxation § 561.

Accordingly, even assuming, *arguendo*, that this case is properly brought in the federal courts, and even assuming, *arguendo*, that 42 U.S.C. § 1983 is applicable, there is no reason to expand the remedy from the one present at common law. The common law has always provided for relief in excessive tax assessment cases, as has Illinois common law in particular, and the taxpayer has failed to explain why the law of damages, as to excessive tax assessment cases, should be any different now. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 231-232 (1970) (Brennan, J., concurring and dissenting). Since the majority rule throughout the states is that pre-judgment interest, in tax refund cases, is not to be awarded without a statute so authorizing it, the taxpayer has failed to show any right to that interest. The taxpayer therefore has no right to equitable relief due to Illinois' legislative decision to deny pre-judgment interest.

In passing, we note that pre-judgment interest is not generally awarded in personal injury cases. See 25 C.J.S. Damages § 53(b). And the mere fact that in allegedly excessive tax cases the taxpayer must first pay the allegedly excessive tax, does not materially distinguish these cases. State and local governments' fiscal necessities have been held to warrant a system of pay-

ment of challenged taxes prior to litigation. See *Perez v. Ledesma*, 401 U.S. 82, 127-128, n. 17 (Brennan, J. concurring) (1971).

The taxpayer, however, relies primarily on *United States v. Livingston*, 179 F. Supp. 9 (E.D. S.C. 1959); *aff'd per curiam*, 364 U.S. 981 (1960), *Educational Films Corp. v. Ward*, 282 U.S. 375 (1931) and *Proctor & Gamble Distrib. Co. v. Sherman*, 2 F. 2d 165 (S.D. N.Y. 1924), to attempt to show that the omission of pre-judgment interest in the Illinois tax refund procedure renders that remedy inadequate. However, there are three major defects in the taxpayer's analysis.

First, as recently as 1966 the Supreme Court stated that it "need not decide whether omission to provide interest on a successful refund application renders the state remedy here an inadequate one within the meaning of § 1341." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). The Court indicated that the issue was still open. Secondly, even the Seventh Circuit, in the opinion below, stated that there "is no dispositive precedent on the issue." 604 F. 2d at 534. Rather, the statements relied on by the taxpayer can, at best, be considered dicta. And finally, none of the cases provide an historical analysis into the availability of pre-judgment interest as an element of damages in a local real estate tax overassessment case. Indeed, Judge Learned Hand's statement in *Proctor & Gamble Distrib. Co. v. Sherman*,* 2 F. 2d 165, 166 (S.D. N.Y. 1924)

* Judge Hand stated as follows:

"[I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than

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seems to be the seminal opinion indicating that omission of pre-judgment interest in a tax refund proceeding may render such a remedy inadequate. However, Judge Hand did not examine the law of damages to determine when pre-judgment interest is in order. And as we have shown, the majority of jurisdictions ruling on the issue have held or stated that pre-judgment interest on tax refunds is not to be awarded unless a statute is interpreted to so provide. Judge Hand's dictum is also consistent with those cases which permit pre-judgment interest where the tax is unauthorized by law or void, but deny it when the tax is excessive. Judge Hand's opinion, which has been cited in other dicta, is not therefore persuasive.

Moreover, Senator Bone, the sponsor of 28 U.S.C. § 1341 stated as follows in his presentation of the Tax Injunction Act:

> Perhaps it should be emphasized at this point that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court. Specific provision is made that the suit will be taken out of the jurisdiction of the Federal court only if a plain, speedy and efficient remedy may be had at law or in equity in the courts of the State. *Thus a full hearing and judicial determination of the controversy is assured.* [Emphasis added.]

81 Cong. Rec. 1415, 1416 (1937). Clearly the purpose of the Act is to remove federal jurisdiction in cases where a taxpayer is assured of a hearing on the merits in state court. This point is also noted in Senate Rep. No. 1035, 75th Cong., 1st Sess. 1937.

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* *continued*
a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value . . ." [2 F.2d at 166.]

The case at bar is also in sharp contrast to *Georgia Ry. v. Redwine*, 342 U.S. 299 (1952), which was relied on by the Seventh Circuit. In *Redwine*, this Court held that a state court remedy requiring the railroad to file over three hundred separate claims in fourteen different counties in Georgia, was inadequate. However, that case rested on the long-standing and well-recognized equity principle permitting equitable jurisdiction to avoid a multiplicity of lawsuits, in addition to the fact that only a portion of the challenged tax could be recovered, at best, under state law in the state courts. The right to pre-judgment interest in a tax refund action, however, has no well-recognized equity background.

Accordingly, we submit that the taxpayer has failed to show that pre-judgment interest is an element of damages in a real estate tax overassessment case. Therefore, the denial of pre-judgment interest is not one of those "recognized heads of equity jurisdiction" *(Shelton v. Platt*, 139 U.S. 591, 595 (1891)) and *Union Pacific Railway Co. v. Ryan*, 113 U.S. 516, 525 (1885) which would permit the remedy at law to be by-passed. The taxpayer's argument is really that equitable relief is the "best" and most "convenient" relief. However, Illinois is not required to provide a taxpayer with the best or the *most* efficient remedy. Only *a* plain, speedy and efficient remedy is required. *Miller v. Bauer*, 517 F. 2d 27, 32 (7th Cir. 1975); *Bland v. McHann*, 463 F. 2d 21, 29 (5th Cir. 1972). Moreover, although the taxpayer would, of course, like to use the equitable forum due to its convenience, this Court has not approved of the use of equity merely for the convenience of the taxpayer. *Arkansas Building & Loan Ass'n. v. Madden*, 175 U.S. 269, 271 (1899). The Seventh Circuit should therefore be reversed because pre-judgment interest on a tax refund is not required to render the Illinois statutory remedy to challenge taxes plain, speedy and efficient.

CONCLUSION

For the foregoing reasons the collector respectfully submits that the opinion and judgment of the Court of Appeals for the Seventh Circuit should be reversed and the order of the District Court should be affirmed.

Respectfully submitted,

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May 31, 1980

APPENDIX

Article IX, Section 4 of the Illinois Constitution provides:

"§ 4. Real Property Taxation

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county."

Ill. Rev. Stat. 1977, ch. 120, sec. 501a provides:

"501a. Classification under Constitution—Necessity for ordinance.) § 20a. Where real property is classified for purposes of taxation in accordance with Section 4 of Article IX of the Constitution and with such other limitations as may be prescribed by law, such classification must be established by ordinance of the county board. If not so established, the classification is void. Added by P.A. 78-700, § 1, eff. Jan. 1, 1974."

Ill. Rev. Stat. 1977, ch. 120, sec. 578 provides, in relevant part:

"In counties having a population of 1,000,000 or more inhabitants, the county assessor shall have authority annually to revise the assessment books each year and

correct the same as shall appear to him to be just and on complaint in writing in proper form by any taxpayer, and after affording such taxpayer an opportunity to be heard thereon, he shall do so at any time, until the time that the assessment is verified . . ."

Ill. Rev. Stat. 1977, ch. 120, sec. 594 provides, in relevant part:

"In counties containing 1,000,000 or more inhabitants, the board of appeals in any year shall (1) On complaint that any property is over assessed or under assessed, or is exempt, review and order such assessment corrected . . ."

Ill. Rev. Stat. 1977, ch. 120, sec. 675 provides:

"Except as otherwise provided in Section 224.1 of this Act, current taxes on real property shall be payable in 2 equal installments. The collector, when so requested by the party paying the taxes shall receive and receipt for such taxes in installments. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes when a particular specification of the part is furnished. If the tax on the remainder of such lot or parcel of land remains unpaid the collector shall enter such specification in his return, so that the part on which the tax remains unpaid may be clearly known. The tax may be paid on an undivided share of real estate. In such case the collector shall designate on his record upon whose undivided share the tax has been paid.

If any person desires to object pursuant to Section 235 of this Act, to all or any part of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall first pay all of the tax installments due and such payment of the tax accompanied by a writing substantially in the following form:

Payment under protest.

Vol. No. ..... Item No. ..... (as the same appear on the General Tax Bill). Original amount of tax $..... Amount of payment $..... This payment shall be ap-

plied to the taxes of all taxing bodies ratably, subject to refund of .....% of the tax, which is objected to on the ground (here set forth ground of objection) and is, accordingly, made under protest.

Name of taxpayer .....

Address .....

The person protesting shall present to the collector 2 copies of the written protest signed by himself. The collector shall write or stamp the date of receiving the same upon the copies, and sign the same, one of which copies he shall retain and the other he shall deliver to the person making the payment under protest.

In counties having 1,000,000 or more inhabitants, and in other counties which have adopted the method provided for in Section 224.1, any such written protest, whether of all or any part of a real property tax, shall be presented to the collector at the time of payment of the second installment of said tax and at no other time.

The person paying real estate taxes under protest shall appear in the next application for judgment and order of sale and object to the taxes in relation to which the protest is made, and upon failure so to do, the protest shall be waived, and judgment and order of sale entered for any unpaid balance of such taxes. . . .

In all counties, when the taxpayer appears and files objection, the court shall, after first determining that due notice, if required, has been given to the tax levying unit, hear and determine the matter according to the right of the case and enter judgment for any part of the taxes, or order a refund of any part of the taxes, so paid under protest. Appeals shall lie from such orders of the court as in other cases of objection to judgment and order of sale for taxes. Refunds shall be made by the collector in accordance with the final orders of the court, and the amount of such refunds shall be deducted from the taxes of the taxing bodies whose taxes were adjudged illegal, in the same or a subsequent year. Proceedings upon objections filed under this Section are subject to Section 194a.

Where any tax is paid in full and protested as herein provided before the delinquent taxes are transcribed into the tax judgment, sale, redemption and forfeiture record, and the taxpayer appears and files objection, the collector, within such time as may be fixed by the court, shall file a transcript from the tax warrant book showing the tax, and such transcript shall be an amendment to the tax judgment sale, redemption and forfeiture record, and the case shall proceed as if the tax had been originally transcribed therein.

In the payment of real or personal property taxes or any installment of real property taxes, the collector shall first apply such payments to interest (including interest added upon forfeiture to real property taxes) and costs, and after the payment of interest and costs such payments shall be applied upon the total tax of real or personal property upon which the payments are made.

No protest shall prevent or be a cause of delay in the distribution of tax collections among the taxing bodies of any taxes collected which were not paid under protest. The collector may withhold from distribution the amounts paid under protest or ½% of the total taxes collected, whichever is less. The collector shall deduct from the taxes of any taxing body for any year the amount of any tax for any year held illegal by the final order of a court, and use the amount deducted to equalize the distribution."

Ill. Rev. Stat. 1977, ch. 120, sec. 675a provides:

"Upon the filing of an objection under Section 194 . . . the court must, unless the matter has been sooner disposed of, within 90 days after such filing hold a conference between the objector . . . and the State's Attorney. If no agreement is reached at the conference, the court must, upon the demand of either the taxpayer or the State's Attorney, set the matter for hearing within 90 days of the demand. Compromise agreements on tax objections reached by conference between the objector . . . and the State's Attorney shall be filed with the court, and the State's Attorney shall prepare an Order covering the settlement and file the same with the

clerk of the court, within 15 days following said conference."

Ill. Rev. Stat. 1977, ch. 120, sec. 710 provides, in relevant part:

"Except as herein otherwise provided, all applications for judgment and order of sale for taxes . . . and for judgment fixing the correct amount of any tax paid under protest shall be made during the month of October . . . If for any cause the Collector is prevented from advertising and obtaining judgment during the month of October it shall be held to be legal to obtain judgment at any time thereafter . . . "

Ill. Rev. Stat. 1977, ch. 120, sec. 716 provides:

". . . The court shall examine the list, and if defense (specifying in writing, the particular cause of objection) be offered by any person interested in any of the lands or lots, to the entry of judgment against them, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. Provided, that no person shall be permitted to offer any such defense unless such writing specifying the particular cause of objection shall be accompanied by an official original or duplicate tax collector's receipt, showing that all taxes to which objection is made have been paid under protest pursuant to the provisions of section 194 of this Act, and it shall be the duty of all tax collectors to furnish such duplicate receipt without charge.

If any party objecting to any tax paid under protest is entitled to a refund of the amount, or any part thereof, so paid under protest, the court shall enter judgment accordingly. The court shall give judgment for such taxes and special assessments and penalties as shall appear to be due, and such judgment shall be considered as a several judgment against each tract or lot or part of a tract or lot, for each kind of tax or special assessment included therein, and the court shall direct the clerk to make out and enter an order for the sale of such real property against which judgment is given, which shall be substantially in the following form:

Whereas, due notice has been given of the intended application for a judgment against such lands and lots, and no sufficient defense having been made or cause shown why judgment should not be entered against such lands and lots, for taxes (special assessments, if any), interest, penalties and costs due and unpaid thereon for the year or years herein set forth, therefore it is considered by the court that judgment be and is hereby entered against the aforesaid tract, or tracts, or lots of land, or parts of tracts or lots (as the case may be), in favor of the People of the State of Illinois, for the sum annexed to each, being the amount of taxes (and special assessments, if any), interest, penalties and costs due severally thereon; and it is ordered by the court that the said several tracts or lots of land, or so much of each of them as shall be sufficient to satisfy the amount of taxes (and special assessments, if any), interest, penalties and costs annexed to them severally, be sold as the law directs.

The order shall be signed by the judge. In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no assessment of property or charge for any of the taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name or in any other name than that of the rightful owner, and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof, and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any other officer or officers connected with the assessment or levying of such

taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court, or by the person (in the presence of the court) from whose neglect or default it was occasioned. Provided, that where separate advertisement and application for judgment and order of sale is made on account of delinquent special taxes or special assessments in all cities, villages and incorporated towns in counties containing a population exceeding 1,000,000 inhabitants by the last preceding census of the United States or of this State, and in cities, villages and incorporated towns in other counties in which the county board by resolution has extended the time in which the return, required by section 209, may be made, the procedure shall in all respects be the same as in this section prescribed, except that there shall be two separate judgments and orders for sale, one on accunt of delinquent special taxes and special assessments and the other on account of delinquent general taxes."

Cook County Ordinance #COM 76815 of December 17, 1973, provides in relevant part:

"Section 2. Real estate is divided into the following assessment classes:

Class 1: Unimproved real estate or real estate used as a farm.

Class 2: Real estate used for residential purposes when improved with a house, an apartment building of not more than six living units, or residential condominium, a residential co-operative or a government-subsidized housing project if required by statute to be assessed in the lowest assessment category.

Class 3: All improved real estate used for residential purposes which is not included in Class 2.

Class 4: Real estate owned and used by a not-for-profit corporation in furtherance of the purposes set forth in its charter unless used for residential purposes. If such real estate is used for residential purposes it shall be classified in the appropriate residential class.

Class 5: All real estate not included in any of the above four classes.

Section 3. The Assessor shall assess, and the Board of Appeals shall review assessments on, real estate in the various classes at the following percentages of market value:

Class 1:	—	22%
Class 2:	—	17%
Class 3:	—	33%
Class 4:	—	30%
Class 5:	—	40%"

Supreme Court, U.S.
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No. 79-1157

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD J. ROSEWELL, etc., et al.,
Petitioners,

vs.

La SALLE NATIONAL BANK, Trustee, etc.,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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Questions Presented

1. Whether the District Court has subject matter jurisdiction under 28 U.S.C. §1343(3) in a suit brought under 42 U.S.C. §1983, challenging constitutionally discriminatory real estate assessment by county taxing officials.

2. Whether taxpayer's complaint states a cause of action under 42 U.S.C. §1983.

3. Whether the Court of Appeals was correct in holding that the denial of interest on tax refunds by the Illinois courts renders the state remedy not "plain, speedy and efficient" and hence lifts the bar of 28 U.S.C. §1341 in an action seeking to enjoin collection of that portion of a real estate tax based on a discriminatory assessment.

4. Whether the Court of Appeals was correct in holding that the possible availability of an action under 42 U.S.C. §1983 in the Illinois courts does not, by virtue of 28 U.S.C. §1341, bar a §1983 action in the federal courts.

Parties in the Court Below

The parties in the court below were:

LaSalle National Bank, Trustee under Trust No. 44891[1]
Edward J. Rosewell, Treasurer of Cook County
Thomas M. Tully, Assessor of Cook County

---

[1] Although LaSalle National Bank, Trustee under land trust No. 44891 is the named respondent, Patricia Cook, as sole beneficiary under the trust, is the real party in interest. A 2-3.

References are:

A: petitioners' separate Appendix
Br: petitioners' brief
Br. A: the Appendix bound in with petitioner's brief
Pet: the petition for writ of certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,
Petitioners,

vs.

La SALLE NATIONAL BANK, Trustee, etc.,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

Constitutional and Statutory Provisions Involved

In addition to constitutional and statutory provisions set out in petitioners' brief, this case involves Section 1 of the Fourteenth Amendment to the federal Constitution which provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The statement of the case by the Court below, *LaSalle National Bank* v. *Rosewell,* 604 F.2d 530, 531-2 (7th Cir. 1979); Pet. 1a-4a, suffices for purposes of the present review with the following additions.

Petitioners' discrimination against taxpayer has continued during the pendency of this suit. The Assessor fixed the 1978 and 1979 assessments at the 1977 level despite complaints filed both before the Assessor (for 1978) and the Board of Appeals of Cook County (for both years). Taxpayer's request for relief from the 1978 assessment is pending in the District Court. See *LaSalle* v. *Rosewell,* No. 79 C 4864. At the same time the Illinois Legislature, as in earlier years, e.g. HB. 1879 and SB. 1061, 78th Gen. Ass. (1973 Session), has declined to adopt bills which would allow interest on tax refunds. See, e.g. HB. 451 and HB. 1317, 81st Gen. Ass. (1979 Session).

SUMMARY OF ARGUMENT

A system of assessment of real property which purposefully and systematically overassesses certain taxpayers violates the Fourteenth Amendment and gives rise to a cause of action under 42 U.S.C. §1983. The present taxpayer has been a victim of this systematic discrimination for at least six years and has adequately stated a claim for which relief against this discrimination can be granted under §1983.

Federal jurisdiction for taxpayer's claim exists under 28 U.S.C. §1343(3) in that this claim involves abridgement of a constitutional provision securing equal rights and under *Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972), such a right, even though rooted in a property interest, is fully cognizable under §1983 and §1343(3).

Taxpayer's §1983 action in federal court is not barred by 28 U.S.C. §1341, which proscribes restraint of state

taxes by federal courts when the state provides a plain, speedy and efficient remedy. The only state court remedy for the deprivation complained of here requires payment of the challenged tax in full and a suit for refund. This remedy, however, is inadequate because refunds paid under it do not bear interest. A correct reading of §1341, its legislative history and pertinent case law and equity principles demonstrate that such inadequacy lifts the bar of §1341.

It is no answer to the inadequacy of the Illinois remedy to say that a §1983 action might possibly be brought in the courts of Illinois. To make §1341 applicable, the adequacy of the Illinois remedy must be certain. Yet it is far from certain that Illinois courts would entertain, and grant the injunctive relief sought in taxpayer's present suit. Moreover, the assumptions which must be made to reach a conclusion that the Illinois courts would grant such relief are so contrary to the purposes of §1341 and §1983 as clearly to be against Congressional intent.

Absent the district court's exercise of the jurisdiction created by § 1343(3) for use in connection with federal civil rights claims, it is clear that taxpayer and countless others will continue to suffer from discrimination in tax assessments which in Cook County has contributed so heavily to urban decay[2] and placed that county 99th on the list of 102 Illinois counties in accuracy and hence fairness of assessments.[3]

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[2] *Biasco Musical Instrument Co., et al.* v. *Cullerton, et al.*, No. 72 C 1224 (N.D. Ill. Decision and Order Jan. 23, 1973, p. 5) ("Disparity in the administration of tax laws can cause chronic and perhaps irremediable blight in a large metropolitan area such as Cook County."); *Hamer* v. *Lenhausen*, 60 Ill. 2d 400, 411 (1975) (Kluczynski dissenting).

[3] See *Chicago Tribune*, Jan. 28, 1979, Sect. 1, p. 16, citing U.S. Census Bureau Report on Real Estate Assessments.

(Emphasis added unless otherwise indicated)

ARGUMENT

I.

The District Court Had Jurisdiction Under 28 U.S.C. §1343(3)[4]

Tax litigants like all others who desire to enter the federal courts must establish a proper jurisdictional basis for it is a "well-established principle that federal courts . . . are courts of limited jurisdiction." *Aldinger* v. *Howard,* 427 U.S. 1, 15 (1976). Hence, prior to this Court's re-affirmation in *Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972) that "rights in property are basic civil rights", *Id.* at 552, cognizable under §§1983 and 1343(3), tax litigants relying solely on §1343(3) for access to the federal courts were routinely turned away for want of jurisdiction. See, e.g., *Hornbeak* v. *Hamm,* 283 F. Supp. 549 (M.D. Ala), *aff'd per curiam,* 393 U.S. 9 (1968); *Gray* v. *Morgan,* 371 F.2d 172 (7th Cir. 1966), *cert. denied,* 386 U.S. 1033 (1967). With *Lynch's* explicit rejection of a distinction between property and personal rights, loss of property through discriminatory taxation in violation of the Fourteenth Amendment falls within the ambit of §1983 and §1343(3) and post-*Lynch* courts have so held. *Garrett* v. *Bamford,* 538 F.2d 63 (3d Cir.), *cert. denied,* 429 U.S. 977 (1976); *Weissinger* v. *Boswell,* 330

[4] Petitioners did not present this question in their petition for writ of certiorari or in the court below and hence improperly argued it in their brief. Rule 34(1)(a).

F. Supp. 615 (M.D. Ala. 1971) (three judge court); *Cf. Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979); *McCarthy* v. *Jones,* 449 F. Supp. 480 (S.D. Ala. 1978); *North American Cold Storage Co.* v. *County of Cook,* 468 F. Supp. 424 (N.D. Ill. 1979).

Petitioners, however, contend that the following language in *Lynch,* n. 6 indicates this Court's view that §1343(3) jurisdiction is nonetheless foreclosed in state revenue cases, Br. 21-3:

> "Congress has treated judicial interferences with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly [citing 28 U.S.C. §1341]. . . . We have repeatedly barred anticipatory adjudication of the validity of state tax laws. . . . The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with long-standing judicial policy."

Rather than foreclosing state tax matters from the reach of §1343(3), this statement does no more than confirm the continued applicability of §1341 notwithstanding the elimination of the property-personal rights distinction. Comment, *Racial Discrimination and the Tax Injunction Act,* 90 Harv. L. R. 616, 623-4 n. 49 (1977). More specifically, it was clear before *Lynch* and it remains clear today that federal jurisdiction to enjoin the assessment levy or collection of a state tax is barred when the state provides a plain, speedy and efficient remedy for the wrong complained of even though, but for §1341, federal jurisdiction over the claim would otherwise exist under

§1343(3) or for that matter under 28 U.S.C. §§1331 and 1332 or any other jurisdictional predicate.[5]

The earlier decisions mentioned in *Lynch,* n. 6, and cited by petitioners, Br. 22, are fully consistent with this view. In *Carter* v. *Greenhow,* 114 U.S. 317 (1885) and *Pleasants* v. *Greenhow,* 114 U.S. 323 (1885) certain taxpayers brought civil rights damage actions against a city treasurer alleging that the latter's failure to accept coupons from state bonds in payment of taxes constituted an impairment of contract rights secured by Article 1, Sec. 10 of the Constitution. This Court affirmed the circuit court's dismissal of the action not on the grounds that the Civil Rights Act does not extend to cases involving state taxes but because the abridgment alleged did not offend the Contract Clause:

> "In any judicial proceeding necessary to vindicate his rights under a contract, affected by legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it." 114 U.S. at 223.

In *Holt* v. *Indiana Manufacturing Co.,* 176 U.S. 68 (1900) a taxpayer brought an action to enjoin an allegedly unconstitutional imposition of state taxes on its patent rights. This Court held that the lower federal court lacked jurisdiction to hear the cause under the Civil Rights Act because abridgment of property rights, which would include

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[5] *Czajkowski* v. *State of Ill.,* 460 F.Supp. 1265 (N.D. Ill. 1977), *aff'd unpubl'd order,* 588 F.2d 839 (7th Cir. 1978) Br. 22-3, clearly misreads *Lynch,* n.6, to hold that §1343(3) will *never* be available in cases involving collection of state taxes. *Lynch* bars §1343(3) only insofar as §1341 can be successfully invoked, i.e., "where there is an adequate remedy in state courts." *The Supreme Court 1971 Term,* 86 Harv. L. Rev. 52, 205 (1972).

rights involving state taxation, was deemed outside the protection of the Act: the Civil Rights Act provisions "refer to *civil* rights only, and are inapplicable here." *Id.* at 72. *Holt* contains no intimation that the tax as distinguished from the property aspect of the subject matter in issue was thought to be controlling by the Court. Chief Justice Stone's opinion in *Hague* v. *Committee For Industrial Organization,* 307 U.S. 496 (1939), a case involving alleged infringements of First Amendment rights, reiterates the distinction drawn in *Holt* and rejected in *Lynch*:

> "[W]henever the right or immunity is one of personal liberty, *not dependent for its existence upon infringement of property rights,* there is jurisdiction in the district court under [the Civil Rights Act] . . . to entertain . . . [an action to secure] it without proof that the amount in controversy exceeds [the amount required by 28 U.S.C. 1331's predecessor]." 307 U.S. at 531-2.

In sum, the thrust of footnote 6 in *Lynch* is simply that when "§1341 is inapplicable, the exception [to §1343(3) jurisdiction] alluded to in the footnote in *Lynch* is likewise inapplicable."[6] *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* 582 F.2d at 1079.

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[6] This case involves a claim of invidiously disparate treatment directly violative of equal rights entitlements secured by the Fourteenth Amendment, see e.g., *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350 (1918); *Raymond* v. *Chicago Union Traction Co.,* 207 U.S. 20 (1907), and hence falls squarely within the embrace of §1343(3) which authorizes federal jurisdiction to redress the deprivation "of any right . . . secured by the Constitution . . . or by any Act of Congress providing for equal rights." Questions regarding the reach of §1343(3) in cases of statutory abridgements or violations of other constitutional denials, see e.g., *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600 (1979) are not presented here. Likewise not before the court is the relationship between §1983 and §1343(3). See *Maine* v. *Thiboutat,* 48 L.W. 4859 (June 25, 1980).

Nothing in the legislative history of the Civil Rights Act supports petitioners' contrary view. Nor is "any such contraction of 1343(3) jurisdiction . . . supported by the legislative history of 1331." *Lynch* v. *Household Finance Corp.*, 405 U.S. at 547-8.[7] Moreover, what this court has said regarding the factoring out of property rights generally from the class of rights covered by the Civil Rights Act applies equally to petitioners' attempt here to factor out tax matters from the larger class of property rights now concededly embraced by §1343 and §1983:

> "The 'cardinal rule . . . that repeals by implication are not favored' . . . thus counsels a refusal to pare down §1343(3) jurisdiction—and the substantive scope of §1983—by means of the distinction between personal liberties and property rights, *or in any other way.*" Id. at 549.

Given the "expansive sweep", *Owen* v. *City of Independence,* ..... U.S. ....., 63 L. Ed. 2d 673, 684 (1980), and "broad" remedial character, *Monell* v. *New York City Department of Social Services,* 436 U.S. 658, 685 (1978); see also *Gomez* v. *Toledo,* ..... U.S. ....., 48 L.W. 4600, 4601 (1980) of the Civil Rights Act, and the consequent mandate that the Act "is to be construed generously" *Id.,* only unequivocal indication from Congress, absent here, that state tax matters are unprotected by the Act could suffice to sustain petitioners' present argument. As this court has said:

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[7] Petitioners' argument actually runs counter to the purpose of the Civil Rights Act and its jurisdictional provision. Justice Stone long ago traced the legislative history evidencing the intent of Congress to permit civil rights suits in the federal courts without regard to the amount in controversy. *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 527-530 (1939) and this Court has confirmed the soundness of that view. *Douglas* v. *Jeannette,* 319 U.S. 157, 161 (1943); *cf. Jones* v. *Mayer Co.,* 392 U.S. 409, 412 n. 1 (1968).

" '[W]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the scope that its language and origins require." *Lynch*, 405 U.S. at 549, n.16.

II.

The Complaint Pleads A Fourteenth Amendment Violation

Petitioners plainly err in arguing that taxpayer has not adequately pleaded a Fourteenth Amendment violation, Br. 23-28.[8] The complaint alleges that petitioner-Assessor imposed taxes for 1977 on the taxpayer which were three and one-half times the taxes levied against property of the same class generally throughout the County, A6; that the Assessor had knowledge of the discriminatory 1977 tax visited upon taxpayer, A7; that as a matter of official policy or governmental custom, he knowingly maintained, adopted, or promulgated policy statements, regulations, decisions and systems of assessment which produced egregious disparities such as that complained of, A7; that these disparities are far greater in size and number in county areas, such as taxpayer's all-Negro, economically deprived community, inhabited by minorities and poorer people as evidenced by official ratio studies (attached to the Complaint) known to Petitioner Assessor, A 5, 7-8; that similar discrimination was practiced against taxpayer in each of the preceding three years resulting in orders of refund (without interest) by the state courts, A 7-8; and that this discrimination was carried out under color of

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[8] Petitioners present their arguments regarding §1343(3) and the complaint's alleged failure to state a cause of action in a single section of their brief. See Br. Point I. For clarity, taxpayer has separated these arguments, answering the former in Point I and the latter in Point II of this brief.

law and in violation of taxpayer's federal constitutional rights. A 3-9. Beyond question such gross, knowingly imposed disparities and such an official system known to produce these disparities offend the Fourteenth Amendment and when practiced under color of law as alleged here state a claim under §1983. *Raymond* v. *Chgo. Un. Traction Co.*, 207 U.S. 20 (1907); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Fulton Market Cold Storage Co.* v. *Cullerton, supra; North American Cold Storage Co.* v. *County of Cook, supra; Weissinger* v. *Boswell, supra; Cf. Garrett* v. *Bamford*, 538 F.2d 63 (3rd Cir.), *cert. denied*, 429 U.S. 977 (1976); *In re Chicago Rys. Co.*, 175 F.2d 282 (7th Cir.), *cert. denied sub. nom. People* v. *Sullivan*, 338 U.S. 850 (1949); *Louisville & Nashville Co.* v. *Public Service Commission*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968); *People ex rel. Toman* v. *Chgo. Union Station Co.*, 383 Ill. 153, 163 (1943).

Petitioners insist, however, that taxpayer's complaint is insufficient under the rule in *Snowden* v. *Hughes*, 321 U.S. 1 (1944), Br. 23-5. In that case a candidate for public office brought a civil rights damage action against members of a state primary canvassing board for their allegedly wrongful failure to issue him the certificate of nomination to which a successful candidate was entitled. This Court struck the complaint for want of federal jurisdiction because there was nothing in the complaint tending to show that in exercising its lawful duty to distinguish between successful and unsuccessful candidates the Board had acted with an invidious and purposely discriminatory purpose. This result followed from the settled principle that mere violation of a "statute is not without more a

denial of the equal protection of the laws", *Id.* at 8. Here taxpayer alleges not merely the fact of a triple overassessment violative of state uniformity requirements. The complaint also alleges that this discrimination was known to the Assessor, that it was produced under an official assessment system known by him to result in egregious disparities, that he refused to correct the overassessment when requested by taxpayer to do so, and that the assessment in issue followed similar overassessments for three preceding years which were held to be illegal by the state courts.[9] This is the very type of "purposeful discrimination" stemming from "a systematic overvaluation" which *Snowden* assayed would be actionable under §1983, 321 U.S. at 9-10, and which recently has been held actionable by the Seventh Circuit. *Fulton Market Cold Storage Co.* v. *Cullerton, supra.*[10]

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[9] Contrary to petitioners' implication, see Br. 28, *McGovern* v. *New York,* 229 U.S. 363 (1913), this case is not alleged to involve mere mistake or error. Likewise petitioners are incorrect in implying that *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* failed seriously to consider whether the allegations there stated a cause of action under §1983, Br. 28. See 582 F.2d at 1079-81; see also *Fulton Market Cold Storage Co.* v. *Cullerton,* No. 74 C 5, Mem. Op. & Order dated Nov. 16, 1979, p. 3; *North American Cold Storage Co.* v. *County of Cook, supra,* 468 F. Supp. at 426.

[10] It apparently is petitioners' theory that a taxing procedure which systematically produces, and is known systematically to produce, great inequities not through mistake but through deliberate design is constitutionally tolerable even when knowingly applied to a taxpayer year after year in the face of state court determinations that such assessments of the taxpayer's property are illegal. That view, however, would effectively repeal the Fourteenth Amendment in tax cases.

The distinctions suggested by petitioners between this case and the tax cases cited in *Snowden, see* 321 U.S. at 9-10, Br. 26-7, are spurious. There is no practical difference between a system which deliberately assesses railroad, coal or bridge companies on a discriminatory basis in violation of uniformity requirements and a system which with like deliberateness discriminates against taxpayers such as the one at bar. In each of these instances the discrimination arises not necessarily from the fact of the disparate assessments alone but from the purposeful involvement of the defendants either in the particular case in litigation or in the system known to produce the inequalities. Plainly such involvement is well pleaded here."[11]

Petitioners' attempt to distinguish more current cases also lacks merit, Br. 27-8. *Garrett* v. *Bamford, supra,* and *Weissinger* v. *Boswell, supra,* both involved widespread lack of uniformity, the former purportedly because of a suspect racial classification and the latter because of the taxing officials' refusal "to perform their duties in accordance with state law." 330 F. Supp. at 622. While there may be racial overtones in the present case, see e.g., A 4, 7-8, they are not necessary to state a cause of action here because as in *Weissinger* the challenged system

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[11] In this term this Court affirmed the liberal construction to be given §1983 complaints at the pleading stage saying that "two-and only two-allegations are required in order to state a cause of action", *Gomez* v. *Toledo, supra,* 48 L. W. at 4601, namely that the defendant has deprived the plaintiff of a federal right and that this was done when defendant acted under color of law. This taxpayer has done that. What petitioners are really asking is that taxpayer "set out *in detail*" the facts she will prove at trial. Notice pleading under the modern rules does not require this. *Conley* v. *Gibson,* 355 U.S. 41, 47-8 (1957).

is said to be the consequence of a conscious, longstanding, county-wide system known to procure the constitutional deprivation. Br. 7.

III.

The Illinois No-Interest Refund is Not Plain, Speedy and Efficient

Petitioners erroneously contend that Illinois' no-interest refund remedy is plain, speedy and efficient as the terms are used in the Tax Injunction Act, 28 U.S.C. §1341.[12] Br. 37-49.[13]

a. Illinois' only remedy—one at law—does not allow interest on refunds

Neither injunctive, *Chicago Sheraton Corp.* v. *Zaban,* 71 Ill. 2d 85, 92-93 (1978); *North Pier Terminal Co.* v. *Tully,* 62 Ill. 2d 540, 545-546 (1976); *LaSalle National Bank* v. *County of Cook,* 57 Ill. 2d 318, 323-324 (1974), other equitable, nor declaratory relief, *Good Year Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421 (1952) is available to taxpayer for unconstitutional tax discrimination in the

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[12] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[13] In this brief taxpayer has followed the order of analysis made by the court below rather than that of petitioners. This section therefore answers Point III of petitioners' brief and the following section answers Point II of petitioners' brief.

courts of Illinois under circumstances of this case. There is in practice a single statutory remedy.[14] Under it a

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[14] Other Illinois remedies mentioned by petitioners, Br. 9-10, n. 37-8, are of no aid to the present taxpayer.

While taxpayer may also challenge her assessment in an administrative proceeding by presenting a complaint before the county board of appeals, 120 Ill. Rev. Stat. §§593-606 (1977), that avenue of relief has proved completely ineffectual. Taxpayer has filed such complaints every year since 1974 without success A 6. Even when the circuit court has found that assessments for earlier years are constructively fraudulent, *In the matter of the application of the County Treasurer and ex-officio County Collector of Cook County, Illinois, for judgment, etc.* for the years 1974, (Misc. 75-36, No. 713), 1975 (Misc. 76-30, No. 465) and 1976 (Misc. 77-34, No. 587), the assesor has refused to modify taxpayer's assessment in the following year, instead uniformly recommending "no change" when consulted by the board of appeals A 6.

Likewise ineffectual is Section 194a of the Revenue Act, 120 Ill. Rev. Stat. §675a (1977), which provides that the Illinois courts must hold a settlement conference within 90 days after a taxpayer files an objection and if no settlement is reached thereafter set the objection for hearing within 90 days of a demand for hearing. First, taxpayer's allegation that there is a customary delay of 2 years in receiving funds upon the successful prosecution of a tax objection suit, A 8, is procedurally admitted in this court, *Jenkins* v. *McKeithen,* 395 U.S. 411, 421 (1969); *Warth* v. *Seldin,* 422 U.S. 490, 501 (1975); *Miree* v. *DeKalb County,* 433 U.S. 25, 27 (1977). Second, contrary to petitioners' suggestion, Br. 37, the Collector's application for judgment is usually not made till late November or early December, nine months after payment of the first installment and four to five months after the final installment of the tax bill is due in Cook County. Even under petitioners' reasoning, if the additional tandem 90-day periods referred to in Section 194a are added to this, it is apparent that at a minimum almost a year will lapse between payment of the final installment and hearing on a protesting taxpayer's objection and well over a year after payment of the first installment. (In aggravated cases where as here the illegal

(footnote continued)

taxpayer must pay the challenged tax in full under protest and sue in the circuit court of the county for refund.[15] See 120 Ill. Rev. Stat. §§675 and 716 (1977); *Clarendon Associates* v. *Korzen,* 56 Ill. 2d 101 (1974). To avail herself of this, the present taxpayer would have had to pay the entire 1977 tax bill of $6,106, including the $4,331 illegal portion, and thereafter institute refund litigation with its attendant costs and attorney fees not recoverable in the statutory proceedings.

There are, however, two notable limitations on this refund method. First, it is customarily accompanied by considerable delay—upwards of two years. Second, no interest is allowed on refunds.[16] *Clarendon Associates* v.

(footnote continued)
assessment is more than triple that permitted by law A 6, the resulting tax will be so excessive that a substantial portion of the excess will be included in the first (March 1st) installment of the tax bill. Perforce, this adds another five months delay (and loss of interest) with respect to refund of the illegal part of the March payment). Third, petitioners fail to note that when the Assessor's discrimination continues year after year A 7-8, requiring the taxpayer to pay in full the challenged tax each year, the delays in the refund procedure often mean that protest payments made with respect to two and three consecutive tax years can be tied up at once, greatly increasing the amount of funds whose use is lost to taxpayer at any one time.

[15] In all Illinois counties except Cook a taxpayer has the option of challenging an assessment judicially prior to payment of the tax. 120 Ill. Rev. Stat. §592.1-5 (1977). This suspect classification is not in issue here.

[16] Illinois courts deny interest on refunds of excessive taxes not only for the period between payment under protest and entry of an order of refund—so-called "pre-judgment" interest, Br. 5—but also for the period between entry of judgment and satisfaction thereof. *Neubert* v. *Foxworthy,* 71 Ill. App. 3d 438 (4th Dist. 1979). Counsel's continued use of the term "pre-judgment" interest masques this.

Korzen, supra; Lakefront Realty Corp. v. *Lorenz,* 19 Ill. 2d 415 (1960). In the latter case the taxpayer had alleged

> "on the basis of language found in *Hopkins* v. *Southern California Telephone Co.,* 275 U.S. 393, 72 L. Ed. 329, that the statutory remedy is inadequate because it does not provide for the recovery of interest on tax refunds." 19 Ill. 2d at 422.

The Illinois Supreme Court held:

> "We are of the opinion the latter view [that interest cannot be allowed upon taxes that were illegally collected in the absence of a statute expressly providing for interest] . . . is the only view compatible with the statutory system which provides for the appropriation, levy, collection and disbursement of taxes in this State, and we think too, as other courts have pointed out . . . that the silence of our refund statute on the question of interest discloses a legislative intention to deny it. Accordingly, we conclude that plaintiff is *not entitled* to interest in the absence of a statute imposing that liability. This being so, *the failure of the statutory remedy to provide for the recovery of interest is no measure of its adequacy.*" 19 Ill. 2d at 423.

Clarendon reiterates this rule:

> "This court has held in *Lakefront Realty Corp.* v. *Lorenz* . . . that under the statutory remedy provided by sections 194 and 235 of the Revenue Act of 1939 . . . the taxpayer is not entitled to interest on the refund. This court also held in *Lakefront* that this fact does not render the remedy at law inadequate so as to justify equity in assuming jurisdiction. We see no reason to depart from that decision." 56 Ill. 2d at 109.

The question thus becomes whether this failure of the Illinois courts to allow interest in connection with the

only available remedy renders the remedy not "plain, speedy and efficient within the meaning of §1341."[17]

b. The federal definition of adequacy controls

It is for this court alone to establish the definitive interpretation of an act of Congress, *Chesapeake & Ohio Ry. Co.* v. *Martin,* 283 U.S. 209 (1931), and in doing so, it is the general rule that, absent a contrary Congressional indication, such interpretation is to have nationwide uniformity and not turn on state law. *NLRB* v. *Natural Gas Utility District,* 402 U.S. 600, 603-4 (1971); *Jerome* v. *U. S.,* 318 U.S. 101, 104 (1942). The question of whether a non-interest remedy is a plain, speedy and efficient remedy within the meaning of §1341 therefore is a federal question for this court to determine on the basis of federal notions of equity jurisprudence and is not controlled by the decision of the Illinois Supreme Court in *Lakefront* or the decisions of any other state court.

That Congress intended this approach to §1341 is certain. For one thing, letting state law determine adequacy under §1341 would effectively bar *all* federal jurisdiction in state

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[17] *Boise Artesian Hot & Cold Water Co., Ltd.* v. *Boise City,* 213 U.S. 276, 282 (1909), relied on by petitioners, Br. 39-40, suggests that a taxpayer is left to his remedy at law "when that remedy is *as* complete, practicable, and efficient as the remedy in equity." It follows that where, as here, the legal remedy is facially inadequate and not merely inadequate by comparison to the equitable remedy, equity may take jurisdiction.

Notably, taxpayer does not claim that the mere illegality of petitioners' acts necessarily warrants equitable jurisdiction. See Br. 49: *Shelton* v. *Platt,* 139 U.S. 591 (1891); *Union Pacific Ry. Co.* v. *Ryan,* 113 U.S. 516 (1885). Rather, for reasons given in this brief, taxpayer claims that the Illinois remedy at law for this illegality is not plain, speedy and efficient.

revenue cases because a state court would never concede that its remedies are less than adequate no matter how "cumbersome and ponderous" as the Illinois Court has characterized the remedy at bar, *People ex rel. Kohorst* v. *G.M. & O.R.R.*, 22 Ill. 2d 104, 109 (1961), oppressive, see, e.g., *Chicago Sheraton Corp.* v. *Zaban, supra,* or inequitable. *Lakefront Realty Corp.* v. *Lorenz, supra.* Yet, §1341's legislative history clearly indicates federal jurisdiction is *not* to be barred "*except* where there is a plain, speedy and efficient remedy" in the state courts, S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); 604 F.2d at 532; Pet. 4a, as this Court and others have recognized repeatedly. See, e.g., *Hillsborough* v. *Cromwell,* 326 U.S. 620 (1946); *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951); *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U.S. 299 (1952); *Garrett* v. *Bamford, supra.*

That Congress did not intend that state law govern the definition of adequacy under §1341 is evident for an added reason in §1983 cases. In such case it would be anomalous that federal law would control, as it certainly does, in the determination of whether a no-interest remedy is adequate so as to bar equitable relief under the Civil Rights Act, *Martinez* v. *California,* 48 L.W. 4077 (Jan. 15, 1980); *cf Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 238 (1969) if federal law were not also to control in determining whether the bar of §1341 applies to a federal court §1983 tax case. Petitioners appear to agree. Br. 31. It would be equally anomalous to ascribe to Congress an intention of permitting the several states to manipulate federal jurisdiction in opposite directions merely by the characterization with respect to adequacy they placed on a no-interest remedy under the circumstances at bar.

c. Federal courts view no-interest remedies as inadequate

1. Section 1341 cases

While it is true that this Court has not expressly decided whether the failure "to provide interest on a successful refund application renders the state remedy . . . an inadequate one within the meaning of §1341", *Department of Employment* v. *U. S.*, 385 U.S. 355, 358 (1966), the leading Section 1341 cases which have considered this question have concluded that a no-interest remedy is not adequate. In *U. S. and E. I. du Pont de Nemours & Co.* v. *Livingston*, 179 F. Supp. 9, 15 (E.D. S.C. 1959) (three judge court), *aff'd per curiam*, 364 U.S. 281 (1960) Circuit Judge Haynsworth found that "the restrictions of 28 U.S.C.A. §1341 should be held inapplicable" on the grounds that it was uncertain whether South Carolina courts would allow interest on the refunds under the tax statute there involved. He said:

> "It is well settled that a *right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld.* Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate. The official position of the Tax Commission at the time of filing of this action and the decision of the Supreme Court of South Carolina in *Colonial Life* requires us to conclude there is presently grave doubt of the existence of a right to recover interest in such cases and that the legal remedy afforded taxpayers in South Carolina is not plain or adequate.
>
> In the face of such official denials, a taxpayer should not be required to run the risk that the official position might be sustained."
>
> * * *
>
> "South Carolina may allow interest upon refunds of taxes or not as she chooses. If she does not make

> clear the existence of the right to recover such interest, however, she necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statutes." *Id.*

Later, a three judge court in the Seventh Circuit reached the same conclusion after determining that a taxpayer challenging an assessment under the Illinois Retailers' Occupation Tax Act was required to file a bond in the amount of the unpaid tax and penalty but, even if successful, could not recover the cost of the bond.

> "A failure to provide interest on a tax refund has been considered by the courts as evidence that a taxpayer does not have a plain, speedy and efficient remedy. *United States* v. *Livingston.* . . . It is the court's view that failure to provide for cost of the required bond is analogous to a failure to provide for recovery of interest on a tax refund." *U. S. and Olin Mathieson Chemical Corp.* v. *Department of Revenue,* 191 F. Supp. 723, 726-727 (N.D. Ill.) (three judge court), *rev'd on other grounds,* 368 U.S. (1961).

Accordingly Section 1341 was held to provide no bar to issuance of federal declaratory and injunctive relief with respect to construction and application of the Illinois sales tax statute.

More recently in *Fulton Market Cold Storage* v. *Cullerton, supra,* a court of appeals, holding that a §1983 action for damages will lie for discrimination of the kind alleged at bar notwithstanding the Tax Injunction Act, observed:

> "Even if §1983 were a supplementary remedy . . . the unavailability in the Illinois courts of certain elements of plaintiff's damage, i.e., interest and at-

torney's fee, *would make the federal remedy necessary* to afford complete relief." 582 F.2d at 1080.[18]

2. Pre-Section 1341 federal equity cases

Section 1341 codified and "gave explicit sanction to the pre-existing equity practice" *Moe* v. *Salish & Kootenai Tribes,* 425 U.S. 463, 470 (1970); see also *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 298-99 (1943) 604 F.2d at 533; Pet. 5a n. 4; Br. 40. Hence, the fact that federal courts exercising equitable jurisdiction before 1937 viewed a no-interest remedy as inadequate provides important added support for the construction placed on §1341 by more recent decisions.[19] 604 F.2d at 533; Pet. 5a n. 4; Comment, *Relief in State Tax Cases,* 93 Harv. L.R. 1016, 1022-23 (1980).

Judge Learned Hand's analysis of more than a half century ago exemplifies pre-1341 thought:

> "[I]t seems to me plain that *it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he estab-*

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[18] Authorities offered by petitioners either do not consider the no-interest question, *Stratton* v. *St. Louis Southwestern Ry. Co.,* 284 U.S. 530 (1932) Br. 44; concern circumstances in which the injunctive relief sought here was available in the state courts, *Bland* v. *McHann,* 463 F.2d 21, 28-29 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973) Br. 44; or involve a request for interest in a refund action *at law, U.S.* v. *Board of Commissioners of Camanche County,* 6 F. Supp. 401 (W.D. Okla. 1934); *Bertelsen and Peterson Engineering Co.* v. *U.S.,* 60 F.2d 745 (1st Cir. 1932). Br. 42-3. None of the latter cases had occasion to consider whether the no-interest remedy at law warranted exercise of equity jurisdiction.

[19] *Livingston,* on which *Olin-Mathieson* relies, viewed many of these pre-1937 cases as controlling authority.

> *lishes that he ought never to have been required to pay at all.* Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong." *Procter & Gamble Distributing Co.* v. *Sherman,* 2 F.2d 165, 166 (S.D. N.Y. 1924).

The same thought was expressed by a three judge court five years before enactment of §1341.

> "[T]here is another reason why the remedy provided by sections 511 and 512 of the Code of 1911 is inadequate. Those sections provide merely for the recovery of the amount of the tax, and no interest. Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means of compensation for the use of money lent or wrongfully detained. *A remedy which does not provide for a reasonable amount of interest is not a complete or adequate remedy."* *Nutt* v. *Ellerbe,* 56 F.2d 1058, 1062 (E.D. S.C. 1932).

This Court intimated like thinking prior to 1937. In *Hopkins* v. *Southern California Telephone Co.,* 275 U.S. 393, 399-400 (1928) in rejecting a challenge to an equity proceeding in the district court, it was noted that in "no

permitted proceeding at law could interest upon payments [of taxes under protest] be recovered for the time necessary to obtain judgments." Several years later Justice Stone expressly recognized the soundness of Judge Hand's remarks in *Sherman,* saying

> "The legal remedy provided by the statute for the recovery of taxes after payment *falls short of adequacy* in at least two respects, *Refund,* if any, *is expressly without interest. . . .*" *Educational Films Corp.* v. *Ward,* 282 U.S. 379, 386 n. 2 (1931).

d. 1341's legislative history also contemplates the exercise of federal equity jurisdiction in no-interest cases

The House and Senate Judiciary Committee Reports, as well as the record of the floor proceedings, make clear that §1341 is not to block access to federal equity when state relief is inadequate:

> "It should be emphasized that *the bill does not take away any equitable right* of the taxpayer or deprive him of his day in court. Specific provision is made that the *suit will not be withdrawn from the jurisdiction of the Federal district court except* where there is a plain, speedy and efficient remedy at law or in equity in the courts of the State. . . ." S. Rep. No. 1035, 75th Cong., 1st Sess. (1937) p. 2.

See also 604 F.2d at 532; Pet. 4a. Given the inadequacy of a no-interest remedy, it follows that federal jurisdiction is not barred by §1341 unless allowing federal jurisdiction would frustrate elimination of the evils at which the Tax Injunction Act was directed. Those evils were two in number, *Fulton Market Cold Storage* v. *Cullerton, supra,* 582 F.2d at 1074; see also *Garrett* v. *Bamford, supra,* 538 F.2d at 66-67; *Tramel* v. *Schrader,* 505 F.2d

1310, 1316 (5th Cir. 1975); *Hargrave* v. *McKinney,* 413 F.2d 320, 325-326 (5th Cir. 1969); 81 Cong. Rec. 1415-1417 (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess. (1937), neither of which would be promoted by federal jurisdiction in this case.

First was the unfairness visited on local citizens who, lacking the diversity of foreign corporations, did not have the latters' access to federal court injunctive relief which was unavailable in the state courts. That concern is not present here: taxpayer is a local resident, seeking relief under 28 U.S.C. §1343 and 42 U.S.C. §1983 which is available in the federal courts to all citizens without respect to their residency.

The second objective of §1341, a variant of the first, was to prevent foreign corporations from disrupting the state taxing process through federal injunctions when the local remedy for a challenged tax was perfectly adequate and diversity jurisdiction was therefore not needed to protect the out-of-stater from local discrimination. As Senator Bone said during the floor debate: "First adopted to bring about justice, it [diversity jurisdiction] has, as a matter of practice, very largely resulted in injustice and discrimination." 81 Cong. Rec. 1417 (1937). The concern focused not on the disruptive impact injunctions can have on local tax administration but rather on the unfairness and inappropriateness of that impact when foreign corporations cause it by invoking diversity jurisdiction to give them "an *advantage* over their adversaries." *Id.* This second consideration is not implicated here, again because of taxpayer's in-state status. To the contrary, the no-interest system at bar operates to the unfair advantage

of the taxpayer, a result for which no Congressional support exists.[20]

e. The failure of some state legislatures to allow interest under the statutory refund procedure does not make those procedures adequate

Petitioners seek to escape the thrust of the foregoing §1341 and federal equity cases and of the Tax Injunction Act's legislative history by contending that the failure of

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[20] Little or no disruption of any legitimate state interest will attend the issuance of a federal injunction in actions such as that at bar. Taxpayer seeks to enjoin payment only of the discriminatory portion of her tax bill. The flow of lawful revenue represented by the proper portion of the tax would continue uninterrupted. Moreover, demonstrating the inadequacy of a no-interest remedy would not open the federal court house doors. That would merely remove the bar of §1341. It would remain to establish, as taxpayer has here, an independent basis for jurisdiction under §1343. *Cf. 28 East Jackson Enterprises, Inc.* v. *Cullerton,* 551 F.2d 1093, 1096 (7th Cir.) *cert. denied,* 434 U.S. 835 (1977). If, as petitioners suggested in the court below, such a "state of affairs" will "seldom" arise, Pet. for Reh. 3, even minimal impact on state tax administration will not occur. If such a state of affairs proves to be more wide-spread, nothing in the policy considerations behind §1341 would bar federal access merely because of any increased strain which might result upon the discriminatory state system. When federal jurisdiction is properly invoked, federal courts have a "virtually unflagging obligation to exercise" it, *Colorado River Water Conservation District* v. *U. S.,* 424 U.S. 800, 817 (1976); see also *England* v. *Board of Medical Examiners,* 375 U.S. 411, 415 (1964). This is especially so in tax cases such as that at bar in which the state legislature could easily "choose", *U. S. and E. I du Pont de Nemours & Co.* v. *Livingston, supra,* to provide an adequate remedy but has deliberately elected not to do so. See, e.g., HB-1879 and SB-1061, 78th Gen. Ass. (1973 Session); HB-451 and HB-1317, 81st Gen. Ass. (1979 Session), interest-on-refund bills which have failed in the Illinois General Assembly. See 604 F.2d at 533; Pet. 6a n.5.

some[21] state courts to award interest in tax refund cases, Br. 40-6, establishes the adequacy of a no-interest remedy for purpose of §1341. Petitioners' analysis is faulty for several reasons.

First, the cited cases, Br. 40-1, are refund not injunction actions. Most determine only whether interest is allowable under the statutory procedure presented. This is merely a matter of statutory construction and does not establish whether those same state courts would deem a no-interest remedy at law to be adequate so as to bar injunctive jurisdiction. Certainly there would be nothing illogical or unusual for equity to conclude that a no-interest remedy at law is inadequate. On the contrary, that is the very type of determination chancellors must and do make every time they exercise their equitable jurisdiction. 1 J. Pomeroy, Equity Jurisprudence §217 (5th ed. 1941)

Second, the reasoning behind many of the no-interest constructions placed on the state statutory remedies presented in petitioners' cases does not apply here. That reasoning rests on a common law principle that interest is not allowed against the sovereign without its consent or agreement. Injunctive relief, however, does not entail the award of interest for when collection of the illegal portion of a tax is enjoined, no refund action is necessary. Nothing is asked of the sovereign. Moreover, since the present suit is directed against local officials, it would be well founded under longstanding precedents of this Court even if it sought interest:

> "It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting recovery. . . . *United States* v. *North Carolina,*

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[21] As petitioners concede, Br. 41, n. a number of states allow interest on tax refunds, even without statutory authorizations to do so, see 88 ALR 2d 823 (1963).

> 136 U.S. 211, 216 . . . But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against *collectors* to recover moneys illegally exacted as taxes and paid under protest, the settled rule is that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector, but directly from the treasury." *National Home* v. *Parrish,* 229 U.S. 494, 496 (1913).[22]

See also *Erskine* v. *Van Arsdale,* 15 U.S. 75, 77 (1872); *cf. Billings* v. *U.S.,* 232 U.S. 261, 287-8 (1914). Even if the present action were thought to be directed at the sovereign, the concept of immunity embodied in the Eleventh Amendment has never in this court's view barred injunctive relief.[23] *Edelman* v. *Jordan,* 415 U.S. 651 (1974);

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[22] By making the rule in *U. S.* v. *North Carolina, supra,* inapplicable to subordinate governmental agencies, e.g., as here to a county and its tax officials, *Parrish* distinguishes many of petitioners' authorities, Br. 41-2, which rely on *U. S.* v. *North Carolina.* See, e.g., *Schlesinger* v. *State,* 195 Wis. 366, 218 N.W. 440, 441 (1928); *Cannon* v. *Maxwell,* 205 N.C. 420, 171 S.E. 624, 625 (1933); *Fajardo Sugar Co.* v. *Richardson, 7* Puerto Rico Fed. Rep. 154 (D. P.R. 1914); *Ford Motor Co.* v. *Baker,* 71 N.D. 298, 300 N.W. 435, 439 (1941).

[23] The protection afforded the sovereign under the Eleventh Amendment has been consistently construed not to extend to political subdivisions such as counties and municipalities. *Edelman* v. *Jordan,* 415 U.S. 651, 667, n. 9; *Mt. Healthy Board of Ed.* v. *Doyle,* 429 U.S. 274 (1977); *Lake Country Estates* v. *Tahoe Planning Agency,* 440 U.S. 391, 400-401 (1979). Moreover, it is now settled that units of local government are "persons" under §1983, *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978) subject to liability flowing from their constitutional violations notwithstanding the good faith of their agents and officers, *Owen* v. *City of Independence,* 48 L.W. 4389 (April 16, 1980). The financial exposure to local governments under this construction of §1983 is markedly greater than any exposure thought to attend the decision below. See n. 20, *supra.*

Milliken v. *Bradley,* 433 U.S. 267, 289 (1977); *Hutto* v. *Finney,* 437 U.S. 678, 689-90 (1978). Finally, to the extent state rules disallowing interest in refund actions are nonetheless deemed pertinent in measuring the adequacy of the Illinois remedy under §1341, this court has considered and rejected those rules. *Billings* v. *U.S., supra,* involved a government claim for interest on overdue taxes.[24] This Court, considering the question of whether interest can be allowed absent statute or agreement, found the state court rule "absolutely in conflict" with the federal rule:

> "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. *Id.* at 287-88.

These precedents plainly state the federal law applicable to the present case and are therefore "controlling if they be not now overruled" *Id.*

There is another aspect of several of petitioners' cases which undermines their persuasiveness on the proposition they urge here. When the taxing statute involved is wholly void or unconstitutional or the challenged tax has been imposed on exempt property those cases either permit interest without statutory authorization on the grounds of the

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[24] *Billings* gives no indication that its analysis was to be restricted to interest awards where the government rather than the taxpayer is the claimant. On the contrary, *Billings'* reliance on leading cases in which taxpayers were claimants, e.g., *National Home* v. *Parrish, supra; Erskine* v. *Van Arsdale, supra,* demonstrates that the court was merely applying to a government claim general principles long settled in taxpayer refund cases.

> "unthinkability of taking a taxpayer's property unconstitutionally and not reimbursing him by the payment of interest for the period during which he was deprived." *Brodsky* v. *Murphy,* 25 N.Y. 2d 518, 255 N.E. 2d 700, 701 (1969),

see also *Boott Cotton Mills* v. *City of Lowell,* 159 Mass. 383, 34 N.E. 367 (1893), or deem the remedy at law to be inadequate so as to warrant the exercise of equity. *Lakefront Realty Corp.* v. *Lorenz, supra,* 19 Ill. 2d at 417.[25] It is, however, difficult to see why these results should not apply with equal force to a case such as that at bar which challenges taxes on the grounds that they violate the guarantees of the Fourteenth Amendment of the federal constitution. Such abridgment involves precisely the "higher degree of intrusion upon the rights of the taxpayer", *Brodsky* v. *Murphy, supra,* 255 N.E. 2d at 702, which the New York Court of Appeals affirmed will warrant the payment of interest even without a statute requiring it.

Finally, and perhaps most importantly, contra. Br. 46, a rule deeming a no-interest refund remedy adequate so as to bar equity is manifestly unacceptable because it shocks the conscience. If Learned Hand could say a half century ago: "[I]n modern financial communities a dollar to-day is worth more than a dollar next year," *Procter & Gamble Distributing Co.* v. *Sherman, supra,* how much more is this true in times of double digit inflation and a twenty percent prime rate. Judge Hand's views on interest accord with those expressed by this court from the earliest times.

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[25] The continued vitality of the Illinois rule allowing injunctive relief against the imposition of taxes on exempt property is somewhat unclear. See *Christian Action Ministry* v. *Dept. of Local Government,* 74 Ill. 2d 51, 57-60 (1978), *overruling, American College of Surgeons* v. *Korzen,* 36 Ill. 2d 340 (1967).

> "It is a dictate of natural justice, and the law of every civilized country, that a man is *bound in equity,* not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach . . . Everyone who contracts to pay money on a certain day knows, that, if he fails to fulfill his contract, he must pay the established rate of interest for his non-performance." *Curtis* v. *Innerarity,* 47 U.S. 146, 154 (1848)

See also *Spalding* v. *Mason,* 161 U.S. 375, 395-396 (1896).

> "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to *considerations of fairness." Jackson County* v. *U.S.,* 308 U.S. 343, 352 (1939).

"Both in law and in equity, interest is allowed on money due . . . in order to arrive at *fair compensation." Miller* v. *Robertson,* 266 U.S. 243, 258 (1924); see generally 36 ALR 2d 337 *et seq.* (1954). Under these settled principles, it is patent that the no-interest character of Illinois' only remedy at law substantially offends elemental considerations of fairness and provides a natural basis for equitable jurisdiction because of its inadequacy. This failure of the Illinois courts to do equity has already resulted in a loss to taxpayer of some $2,000[26] and led the court below to state the obvious:

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[26] In 1974, 1975 and 1976 respectively, the county exacted illegal excessive taxes from taxpayer in the approximate amounts of $4,600, $3,650 and $3,950 and held these sums before refund was ordered by the circuit court for periods of 3, 2 and 1 years respectively. Even at average prime for that period (which as a practical matter was not available to this taxpayer), taxpayer lost, and the county gained some $2,000 on the use of the illegally exacted money—an amount which about equalled the total just tax in any of the year in question. A 8-9.

> "The Illinois tax grievance remedy, which forbids the recovery of interest and allegedly involves a two-year delay prior to refund payment, gives a *financial incentive* to one of the parties (the County) *to delay* dispute resolution and imposes severe financial hardships on private parties seeking to redress their grievances." 604 F.2d at 536; Pet. 11a[27]

IV.

An Illinois State Court Remedy for Injunctive Relief Under §1983, Even if *Arguendo* Available. Would Not Constitute a Plain, Speedy and Efficient Remedy Under §1341

Petitioners argue that even if a no-interest remedy is inadequate, taxpayer has a plain, speedy and efficient remedy in the Illinois courts because she can bring the instant complaint there under §1983. Br. 29, *et seq.* The argument is unsound for several reasons.

First, the cases cited by petitioner as authority for the proposition that the availability of a §1983 action in state

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[27] Petitioners suggest a §1983 damage action, in which according to petitioners there would be no recoupment of lost interest, Br. 39-49, will put "less pressure on the system" than injunctive relief. Br. 33. This misses the point. Adequacy of the state court remedy, not pressure on the system, controls the application of §1341. Where, as here, that remedy is shown to be not plain, speedy and efficient, taxing officials whose own discrimination has created a potential for pressure cannot be heard to say equity should stay its hand. It is also noteworthy that at stake here is the vindication of constitutional rights abridgment of which has, for this taxpayer, required remedial action in each of six consecutive years. Multiplicity of suits constitutes an additional dimension of inadequacy. See Comment, *Relief in State Tax Cases,* 93 Harv. L. R. 1016, 1020 n. 21 (1980).

courts constitutes a plain, speedy and efficient state court remedy under § 1341 are inapposite. Br. 30. "None of these cases justifies its holding with any detailed analysis of the relationship between" §§1341 and 1983. 604 F.2d at 537, n.10, Pet. 13a. Moreover, in each of these cases—*Horn* v. *O'Cheskey,* 378 F. Supp. 1280, 1286 (D.N. Mex. 1974); *Green* v. *Klinkofe,* 422 F. Supp. 1021, 1027 (N.D. Ind. 1976); *Advertiser Co.* v. *Wallace,* 446 F. Supp. 677, 680 (M.D. Ala. 1978)—there was available state court injunctive and/or declaratory relief—the very form of relief sought by the present taxpayer but indisputably *unavailable* to taxpayer in the courts of Illinois. See *Chicago Sheraton Corp.* v. *Zaban,* 71 Ill. 2d 85, 92-3 (1978); *Goodyear Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421 (1952).

Second, while it may be true that state courts *may* entertain §1983 actions, *Martinez* v. *California,* ..... U.S. ....., 48 L.W. 4076, 4077, n. 7; *Maine* v. *Thiboutat, supra,* 48 L.W. at 4860, n. 1, this court has reserved the question whether they *must. Id. Testa* v. *Katt,* 330 U.S. 386, 394 (1947) held that a state is not free to refuse enforcement of a federal claim "where the same type of claim, if arising under state law, would be enforced in the state courts." *Martinez* v. *California, supra.* That, however, is not the situation presented here for it is certain that the Illinois courts, if presented with the instant taxpayer's claim for injunctive relief on the grounds that the uniformity provisions of the state constitution have been violated, would *not* give relief. *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill. 2d 415 (1960); *Clarendon Assoc.* v. *Korzen,* 56 Ill. 2d 95, 109 (1973). Therefore, there exists the substantial question not only whether an Illinois court must accept jurisdiction over a §1983 action seeking to enjoin a state tax but also whether it would. Such uncertainty relieves taxpayer of trying her

luck under §1983 in the courts of Illinois. *Hillsborough* v. *Cromwell,* 326 U.S. 620, 626 (1946).[28]

Third, even assuming the courts of Illinois would entertain a §1983 injunction suit touching a state revenue matter, considerable doubt exists as to whether they would apply federal equity law as announced by the court below (i.e., holding that a no-interest remedy is inadequate) or whether, instead, they would follow the contrary rule under *Lakefront.* And while *Martinez* v. *California, supra,* makes clear that in state court §1983 actions certain state defenses cannot be allowed to the extent they would immunize §1983 defendants from the consequences of their unconstitutional practices, it is far from clear that the Illinois courts would feel bound by the "federal" equity principle articulated by the Seventh Circuit in this case. 604 F.2d at 537-8 n.12; Pet. 14a, n.12; Comment, *Racial Discrimination and the Tax Injunction Act,* 90 Harv. L. R. 616, 623-4, n. 49 (1977).

In *People ex rel. Korzen* v. *Fulton Market Cold Storage Company,* 22 Ill. App. 2d 3rd 1088 (1st Dist. 1974) *rev'd,* 62 Ill. 2d 443, *cert. denied,* 429 U.S. 833 (1976), a taxpayer sought a refund from the Illinois courts in the statutory proceeding alleging, *inter alia,* a count under Section 1983. The taxpayer raised the §1983 claim in the trial court and argued it in both the Illinois Appellate and Supreme Courts, contending that because a federal cause of action

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[28] Three weeks ago petitioner Tully, represented by counsel of record here, asserted in a tax injunction matter pending before the Illinois Appellate Court:

> "42 U.S.C. 1983 does not apply to tax cases." *The 400 Condominium Ass'n.* v. *Tully,* No. 78-873 (1st Dist.) Objections to Plaintiffs-Appellants' Motion for Reconsideration, p. 1.

Petitioner Tully's contrary argument here, Br. 29-36 completely vitiates Point II of his present brief. He cannot now contend that the availability to this taxpayer of §1983 relief in the courts of Illinois is anything but extremely uncertain so as to lift the bar of §1341.

under §1983 was involved, the federal doctrine, that in a civil rights action the state remedy "need not be first sought and refused before the federal one is invoked", controlled. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961); 22 Ill. App. 3d at 1089; see *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963). The Illinois Supreme Court, however, squarely held that the Illinois doctrine requiring exhaustion governed and dismissed taxpayer's complaint.[29] 62 Ill. 2d at 446-447. There is no reason to believe the Illinois courts would take a different approach here and put aside the state rule that a no-interest remedy is adequate and adopt the contrary federal rule.

At the very least substantial uncertainty exists as to what rule the Illinois courts would follow, and hence what relief they would afford in a §1983 case, as petitioners candidly recognize:

> "This is not to say that the decision of the state court as to whether federal equity law requires pre-judgment interest on tax refunds will necessarily accord with the opinion of the court below." Br. 31[30]

This uncertainty lifts the bar of 1341. *Hillsborough* v. *Cromwell, supra; Garrett* v. *Bamford, supra,* 538 F.2d at 70.

Fourth, even if it were certain what Illinois courts hearing taxpayer's §1983 claim would do regarding *Lakefront,* it would not follow that §1341 requires taxpayer to take

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[29] When a federal court was presented with *Fulton's* claim, it applied the federal rule on exhausting and sustained the taxpayer's complaint. *Fulton Market Cold Storage* v. *Cullerton, supra,* 582 F.2d at 1080.

[30] Petitioners declared below:

"The facts pleaded in the Complaint show that taxpayer is *not* entitled to equitable relief under Illinois law." Pet. for Reh. 3, n.

that claim to the state court. If *Lakefront* were thought to control, it would clearly indicate state court unwillingness to protect federal rights and the policy considerations behind §1983 would demand access to the federal courts. *Monroe* v. *Pape,* 365 U.S. 167, 173-180 (1961); *Mitchum* v. *Foster,* 407 U.S. 225, 240-2 (1972). The contrary assumption—that Illinois courts would be bound by the federal equity jurisprudence enunciated in the court below is even less helpful to petitioners because thus forcing state courts to ignore their own equity principles and follow those developed by the federal courts conflicts in the extreme with §1341's policy against federal intrusion into state tax matters. Given the antipathy of the Illinois courts to imposition of federal jurisprudence upon it as illustrated in *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill.2d 420 (1976), and a later suit, *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 63 Ill.App.3d 880 (1st Dist. 1978) where the courts refused to take jurisdiction in a case involving *Pullman*[31] like abstention stating:

> "As this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court", 65 Ill.2d at 425,

it is hard to imagine how the interests of comity could be more offended and state court freedom in tax matters more attenuated than by requiring state courts to follow federal equity rules. Such, however, would be the case if those courts were compelled to follow the decision below.

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[31] *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941). The reasons underlying petitioners' reference to the *28 East Jackson* cases, Br. 18-19, are not evident unless it be to furnish another example of egregious overassessment in Cook County. Counsel have been informed that taxpayer has deposited with her attorneys what she holds to be the just amount of her 1977 taxes and has paid the just portion of her 1978 taxes to petitioner Collector. Final bills for 1979 taxes have not yet been issued.

Finally, if petitioners are correct that §1341 requires that taxpayer lodge her §1983 claim with the state court, then the court below is entirely correct in saying that "the Tax Injunction Act would bar federal jurisdiction in *all* cases involving state tax operations—without exception", 604 F.2d at 538; Pet. 15a, an anomalous result for which petitioners offer no authority. To be consistent, this would be true even in diversity (and presumably, in federal question) cases, contrary to petitioners' assertion, Br. 32, 3, since §1341 would still require pleading the federal civil rights claim in the state court in a §1983 action. "Although Congress possesses the power to legislate this result, there is no indication that the Tax Injunction Act was meant to do so." 604 F.2d at 538; Pet. 15a[32]

In sum, petitioners' argument that §1341 forces the present taxpayer to litigate her §1983 claim in state court lacks authority and offends the policies behind both statutes. What petitioners really seek by this tack is to protect the income they have been earning by investing for two years, A 8, the excess taxes taxpayers must post in order to pursue Illinois' only remedy at law. This, however, is nothing short of taking property without due process, and it was to relieve just such deprivations

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[32] Excusing only diversity plaintiffs from bringing their §1983 actions in state court, Br. 33, is equally anomalous. Abuse of diversity jurisdiction by out-of-state taxpayers was the very reason for §1341's enactment, *supra* 23-25, with the result that jurisdiction under 28 U.S.C. §1332 is the prime example of federal jurisdiction curtailed by the Tax Injunction Act. Moreover, there is no evidence in the legislative history of the Act that Congress intended to give the wealthy out-of-stater who could satisfy 28 U.S.C. §1332's jurisdictional amount preferred access to the federal courts in civil rights matters involving state revenue. Yet under petitioners' theory General Motors would not be required by §1341 to present its §1983 tax claims to the Illinois courts while an impoverished local taxpayer would.

stemming from inadequate state remedies that the Civil Rights Act was enacted.[33] *Monroe* v. *Pape, supra,* 365 U.S. at 173-4.

Considerations of comity and federalism as expressed in *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Trainor* v. *Hernandez,* 431 U.S. 434 (1977) do not aid petitioners. Br. 34-6. These cases require the district court to refrain from exercising its jurisdiction over a suit[34]

> "challenging the constitutionality of a state law under the Federal Constitution and seeking to have state officers enjoined from enforcing it . . . when it appears that the State has already instituted proceedings in the state court to enforce the challenged statute against the federal plaintiff and the latter could tender and have his federal claims decided in the state court." *Trainor* v. *Hernandez, supra,* 431 U. S. at 440.

Exercise of federal jurisdiction under such circumstances is viewed to offend "basic concerns of federalism" through unseemly interference "with legitimate state functions, particularly with the operation of state courts." *Id.* at 441.

Younger abstention has no place where, as here, the federal constitutionality of a state law is not under attack,

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[33] Taxpayers whose monies are returned after long delays without interest in economic reality pay an added tax measured by the refund's use value (interest) which the county retains. That use value *pro tanto* reduces the amount of revenues otherwise required from the general populace such that the disfavored taxpayers subsidize the rest of the county. This added tax, imposed without legal warrant, plainly and invidiously discriminates against the disfavored taxpayers and results in a classic taking of property without due process. See Comment, *Federal Injunctive Relief in State Tax Cases,* 93 Harv. L. R. 1016, 1023 (1980).

[34] This Court has never held that "*Younger* principles apply to *all* civil litigation." *Trainor* v. *Hernandez, supra,* 431 U.S. at 496 n. 8 or to the present civil circumstances.

no unsettled questions of state law are involved,[35] *Id.* at 445, there is no prior pending state suit,[36] *Id.* at 444, and

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[35] The controlling question of state law in this case has been authoritatively settled by the Illinois Supreme Court in *Lakefront Realty Corp.* v. *Lorenz, supra,* and *Clarendon Association* v. *Korzen, supra;* Illinois denies interest on tax refunds and this denial does not render the remedy at law inadequate so as to warrant the exercise of equity jurisdiction by the Illinois courts. There is, therefore, no need to afford to these courts "the opportunity . . . to construe", *Id.* at 445, the Illinois Revenue Act under the present circumstances. On the other hand, §§1983 and 1341 are federal laws whose construction is not pre-eminently a matter of state concern.

[36] While it may be true that a district court injunction may prevent the petitioner Collector from going to judgment against taxpayer in his annual application for judgment and order of sale under 120 Ill. Rev. Stat. §§675 and 716 (1977), that is a summary proceeding in which the state court may only grant or deny refunds "as the right of the case may be." *Id.* §716. Even upon finding a challenged tax constructively fraudulent or constitutionally offensive, the Illinois courts in a §716 proceeding are without power to award interest, provide equitable relief or otherwise fashion a remedy to correct or forestall the harm (loss of interest) which threatens taxpayer. The Collector's application is therefore clearly not within the class of prior pending actions which raise *Younger* considerations.

The already noted uncertainties attending a concomitant equitable action, even under §1983, in the Illinois courts, *supra* 31-36, are compounded by unsettled questions regarding taxpayer's ability to return to the federal court in the event the Illinois courts decline to grant adequate relief. An unreserved tendering of federal rights to the state court in compliance with *28 East Jackson Enterprises, Inc.*, v. *Rosewell*, 55 Ill. 2d 420 (1970) and *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 551 F.2d 1093 (7th Cir.), *cert. denied*, 434 U.S. 835 (1977); and *28 East Jackson Enterprises, Inc.* v. *Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978), raises the prospect that taxpayer would be barred from returning to the federal court, see *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); *Sacks Bros. Loan Co., Inc.* v. *Cunningham*, 578 F.2d 172, 175 n.11; *Mr. Boston Distiller Corp.* v. *Pallot*, 469 F.2d 337 (5th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), notwithstanding taxpayer properly invoked §1343(3) jurisdiction on an attempted return to the federal court. See *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

the remedy at law provided by the state court is inadequate:

> "Although the existence of an adequate remedy at law barring equitable relief normally would be determined by inquiring into the remedies available in the federal rather than in the state courts . . . [under *Younger* principles] the inquiry was to be broadened to focus on the remedies available in the *pending state* proceeding." *Id.* at 441

That, however, is the very inquiry mandated by §1341 in tax cases and made by taxpayer in Point III of this brief. The Tax Injunction Act thus subsumes the policy concerns behind the *Younger* decision, *Id.* at 444 n. 8, so that a demonstration that the Illinois remedy is not plain, speedy and efficient for purposes of §1341 suffices to establish the inapplicability of *Younger*. Petitioners thus introduce a red herring by arguing §1341 is somehow at odds with *Younger*. The question is not whether the state courts have "wide berth" in tax matters, Br. 35, but rather whether the remedies they provide for constitutional abridgments in the revenue area are adequate. If they are not, as taxpayer argues, because of the failure to allow interest on refunds after long delays, no consideration of comity and no policy concerns behind §1341 preclude federal jurisdiction. If there is an "unseemly tug of war", Br. 36, it is not because of some inherent stress in our system of federalism but solely because Cook County, under color of Illinois law, is systematically, year after year, exacting an illegal tax from taxpayer and countless others, profiting therefrom by investment of the moneys wrongfully exacted. See 120 Ill. Rev. Stat. §675 (1977).

In fine, the holding in *Tully* v. *Griffin*, 429 U.S. 68, 73 (1976) that federal courts refrain from enjoining the collection of state taxes "except in cases where an asserted federal right might otherwise be lost", Br. 14, 19, 32, 39, in no way alters the settled law that a federal right is "lost" for purposes of Section 1341 when a state fails to

redress its abridgment by a plain, speedy and efficient remedy. The pervading question in this case is whether a no-interest remedy—the sole relief given by Illinois—can ever be considered adequate when habitual delay in the refund procedure and inexorable inflation cause the no-interest refund in real economic terms to be less, often far less than the illegal exaction. Unless settled concepts of value are to be ignored, the answer, perforce, must be that the no-interest remedy is inadequate and that taxpayer's asserted federal rights under the Fourteenth Amendment have been lost and will continue to be lost in the courts of Illinois absent federal, equitable relief. Fundamental fairness, not comity, is the real issue here. If Illinois chooses to be unfair, that is her right. But she cannot then complain as she does through the present petitioners when the federal courts, as contemplated by Sections 1343(3) and 1983, *Mitchum* v. *Foster, supra,* 407 U.S. at 242, and by Section 1341, *Hillsborough* v. *Cromwell, supra; Georgia R.R.* v. *Redwine, supra; Garrett* v. *Bamford, supra,* intervene to prevent that unfairness.

V.

CONCLUSION

For the above reasons, taxpayer prays that the decision of the court of appeals be affirmed.

Respectfully submitted,

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Supreme Court of the United States

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EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Introduction

It may be helpful to restate the collector's* position in order to focus the various issues which are argued in the taxpayer's brief, and to which this reply is directed. The collector maintains first that §1343(3) jurisdiction is lacking in this case because the subject matter involves a constitutional challenge to the collection of local real estate taxes. As an allied argument, the collector asserts that the complaint fails to allege intentional or purposeful violation of the taxpayer's fourteenth amendment rights with the specificity which this Court has demanded over the years. See, *Snowden v. Hughes*, 321 U.S. 1, 7 (1944). Finally, even if the district court had jurisdiction under §1343(3), and even if the complaint stated a specific cognizable claim of tax discrimination, the taxpayer was accorded a plain, speedy and efficient remedy in state court, and, of course, a federal damage remedy for her federal claims under *Fulton Market Cold Storage Co. v. Cullerton*, 528 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

It is signally important that the taxpayer has failed to allege inability to pay the 1977 real estate taxes due on her property. Indeed, the complaint specifically asserts that the taxpayer is ". . . able financially to pay her taxes in full and sue for a refund, albeit at substantial expense, loss and burden." (Comp. Par. 16; A. 9). Irreparable injury is non-existent in a tax case where

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* Petitioners Edward J. Rosewell, County Treasurer and Ex-Officio Collector of Cook County, and Thomas M. Tully, former Assessor of Cook County are the county tax officials who performed duties imposed by the Illinois Revenue Act. Hereinafter they will be referred to as "the collector."

the taxpayer has the funds to pay the tax and, thus, the ability to forestall the loss of the property brought about by the judicial sale procedures of the Illinois Revenue Act. As argued in the initial brief, vital considerations of federalism, comity and equitable restraint require the federal district court ". . . to refrain from interfering with a state's collection of its revenue except in cases where an asserted federal right might otherwise be lost." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Again, it is hard to see how any of the taxpayer's federal rights will be lost where she has available to her (1) the standard Illinois tax remedy; (2) an action under §1983 in state court for damage to her federally protected rights; and (3) a damage action in federal court under *Fulton Market, supra.*

Therefore, whether one focuses upon the congressional policy established in §1341 regarding state remedies, or upon the historic precedential limitations of federal equity,* it is clear that the federal injunction sought by the taxpayer herein is totally unwarranted. The pattern of state and federal real estate tax remedies produced by acceptance of the collector's position herein has the beneficial effect of striking a fair balance among the varied interests presented in the case.

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* In *Matthews v. Rogers*, 284 U.S. 521 (1932) this Court held that:

> If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question is involved, Jud. Cod. Sec. 237, *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.* (Citations omitted) (Emphasis supplied).

Id. at 526. See also: *Fulton Market Cold Storage Co. v. Cullerton*, 528 F.2d 1071, 1076 (7th Cir. 1978) *cert. denied*, 439 U.S. 1121 (1979).

If a taxpayer cannot meet the statute's condition precedent of tax prepayment, then the Illinois statutory legal remedy is unavailable to that taxpayer. Such a taxpayer would, therefore, be entitled to litigate the valuation claims in equity in state court, and to seek injunctive relief. *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 106-107, 306 N.E.2d 299, 302-303 (1973). If the taxpayer is able financially to pay the taxes in full and seek a refund (Comp., Par. 16; A. 9), then the threat of loss of the real estate is non-existent, and the taxpayer can follow out such state or federal damage remedies as are available and appropriate to repair the monetary damage caused by the alleged violation of the taxpayer's constitutional or statutory rights. The opinion of the court below frustrates this pattern, and sanctions unwarranted federal anticipatory litigation of state tax valuations contrary to the letter and spirit of *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) and *Trainor v. Hernandez*, 431 U.S. 434 (1977).

I.

THE SCOPE OF JURISDICTION UNDER 28 U.S.C. §1343(3) DOES NOT INCLUDE CASES INVOLVING CONSTITUTIONAL CHALLENGES TO THE COLLECTION OR VALIDITY OF STATE TAXES.* (Reply to Taxpayer's Argument I, Br. at 4-9.)

The collector maintains that §1343(3) does not support jurisdiction of a tax case like that at bar. The focus is

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* Collector's Arguments I and II herein are jurisdictional arguments, and, thus, alternative to the §1341 questions discussed in Arguments III and IV of this Reply Brief. The taxpayer's brief, at 33 n. 28, creates the misleading impression that the collector has taken a position in a pending Illinois tax injunction appeal contrary to Argument IV herein. [*400 Condominium Assn. v. Tully*, No. 78-873 (1st Dist. 1980)] In that case, an appeal in which the taxpayer successfully challenged an assessment as one unauthorized by law, the tax-

(Footnote continued on following page)

not upon whether the interest asserted is a personal right or a property right, but rather, historically, whether the tax related rights involved herein are "civil rights." This Court held that they were not in *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68, 72 (1900). Moreover, in those portions of the Virginia Bond coupon cases where relief was sought under the Civil Rights Act, jurisdiction was denied. *Carter v. Greenhow*, 114 U.S. 317 (1884) and *Pleasants v. Greenhow*, 114 U.S. 323 (1884). It is important to note that relief in those cases was granted to Virginia Bond coupon holders (1) who brought detinue actions in state court, *Poindexter v. Greenhow*, 114 U.S. 270 (1884); (2) who brought damage actions in federal court premised on federal question jurisdiction, *White v. Greenhow*, 114 U.S. 307 (1884); (3) who brought trespass actions in state court, *Chaffin v. Taylor*, 114 U.S. 309 (1884); (4) and who brought injunctive actions in federal court based on federal question jurisdiction, *Allen v. B & O R.R. Co.*, 114 U.S. 311 (1884). These cases support denial of federal jurisdiction in the case at bar.

More recently the district court in *Czajkowski v. State of Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977) cited the foregoing cases, and the fact that they were distinguished, not overruled, in *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972), to support the proposi-

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footnote continued

payer had moved for attorneys fees based in part on 42 U.S.C. §1988. Tully objected on the grounds that the action was not based on federal law, but rather on a provision of the Illinois Condominium Act. The portion of the "Objections" quoted by the taxpayer omits the two cases which were cited to support the assertion, i.e. "See *Lynch v. Household Finance Corp.*, 92 S. Ct. 1113 at 1117 (Fn. 6), and *Czajkowski v. State of Illinois*, 460 F. Supp. 1265 at 1277 (N.D. Ill. 1977)." It is therefore clear that the collector has consistently maintained that, if civil rights jurisdiction does apply to tax cases (as opposed in Arg. I herein), then Illinois courts will hear them (as maintained in Arg. IV herein).

tion that §1343(3) jurisdiction should be denied in tax cases.

The history of the Civil Rights Act clearly indicates that it was enacted to create (1) "a species of tort liability." *Carey v. Piphus*, 435 U.S. 247, 257 (1978); (2) which could be remedied in the federal courts. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). The need for the law was rooted in the official lawlessness following the Civil War, when certain state courts were effectively closed to black citizens. Nowhere in the legislative history is there any indication that this "trouble" extended to tax matters, or to cases involving the validity or collection of state taxes. As a matter of history, state courts have generally been available to protect rights affected by taxation. See e.g. the Virginia Bond Coupon cases, *Poindexter v. Greenhow*, 114 U.S. 270 (1884) and *Chaffin v. Taylor*, 114 U.S. 309 (1884). The taxpayer's attempt to distinguish this Court's treatment of *Pleasants*, *Carter* and *Holt* in *Lynch* footnote 6 misses the point. There is no question that the footnote correctly and accurately observes that those cases ". . . were consistent with congressional restrictions of federal jurisdiction in this special class of cases and with longstanding judicial policy." *Lynch*, 405 U.S. 542-43 n.6. What the Court did not decide in *Lynch* was the question elucidated in *Czajkowski v. State of Illinois*, *supra*, as to the precedential value of *Carter*, *Pleasants*, and *Holt* on the scope of civil rights jurisdiction in tax cases. Accordingly, the taxpayer's efforts to distinguish those cases in light of *Lynch* must fail.

II.

THE TAXPAYER'S ALLEGATIONS FAIL TO STATE AN EQUAL PROTECTION CLAIM UNDER THE FOURTEENTH AMENDMENT. (Reply to Taxpayer's Argument II, Br. at 9-13.)

The collector maintains that the taxpayer has failed to allege facts which show intentional or purposeful violation of fourteenth amendment rights. At bottom, the equal protection clause is a limitation upon state classifications, and ". . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).

This Court has enforced the fourteenth amendment to prohibit state tax systems which have, de facto, established specific, disadvantaged classes. The cases which the taxpayer has cited at page 10 of her Brief (*Raymond*, etc.) are specific examples. It should be carefully noted, however, that those cases all involved corporations, and dealt with a specific problem rooted in the history of the state's taxation of corporate real estate. Prior to the recognition that corporations could constitutionally be treated differently from individuals, states assessed certain types of industrialized corporate real property (i.e., railroads, steel mills, etc.) at full value as usually was required by the state constitution. The difficulty arose when other property, particularly residential property, was often substantially underassessed. When the railroads and steel companies complained about this, the states maintained that their constitutions required "full value" assessments, and that the railroads and steel mills were, indeed, assessed at "full value." This position was often combined with the advice that the corporate complainant take action to see that the other underassessed property was brought up to

full value. See e.g. *Hillsborough v. Cromwell*, 326 U.S. 620, 623-26 (1946); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

The *Raymond* line of cases authorizes relief in such situations, where ". . . the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute." *Snowden v. Hughes*, 321 U.S. 1, 9 (1944).

The *Raymond* problem has, of course, been diminished substantially by this Court's recognition of the states' power to make legitimate classifications reasonably based upon the corporate form of the taxpayer. *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356 (1973).

The taxpayer asserts that the foregoing distinction is "spurious" and that "There is no practical difference between a system which deliberately assesses railroad or coal or bridge companies on a discriminatory basis in violation of uniformity requirements and a system which with like deliberateness discriminates against taxpayers such as the one at bar." Taxpayer's Br. at 12. Ignoring the historical significance of the *Raymond* line of cases, this statement confuses the classification of taxpayers on the basis of corporate nature, with the implementation of a tax system which sometimes overassesses property. The taxpayer's argument simply proves too much. If accepted, it would justify an equal protection claim for every overassessment, since no tax system is perfect, and all tax systems worthy of the name are deliberately and systematically implemented.

More than 100 years ago the Court observed in an Illinois tax case—". . . (P)erfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized." *State Railroad Tax Cases*, 92 U.S. 575, 612 (1875).

In a similar vein, the Court observed a century later, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that:

> "No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex area in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 41 (1973). While *Rodriguez* unquestionably deals with the broader question of tax source classifications, the underlying theme is consistent.

In the final analysis the taxpayer's complaint shows an ongoing tax dispute between the collector and the taxpayer based on an alleged overassessment resulting from implementation of the Revenue Act. That, without more, is not enough to state a federal constitutional claim. *Snowden*, 321 U.S. 1, 9 (1944).

III.

THE ILLINOIS STATUTORY REAL ESTATE TAX REMEDY IS PLAIN, SPEEDY AND EFFICIENT, DESPITE ITS FAILURE TO PROVIDE PREJUDGMENT INTEREST. (Reply to Taxpayer's Argument III, Br. at 13-31.)

The taxpayer argues that the Illinois statutory remedy for challenging taxes in alleged overassessment cases is not "plain, speedy, and efficient" because the statutory remedy fails to award prejudgment interest* on refunds.

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* The taxpayer suggests that *Neubert v. Foxworthy*, 71 Ill. App. 3d 438, 389 N.E.2d 898 (4th Dist. 1979) indicates that the taxpayer is denied usual post-judgment interest authoriz-

(Footnote continued on following page)

Moreover, it is clear that the taxpayer has, by this argument, focused only upon the state statutory remedy.* This truncated argument incorrectly avoids consideration of state and federal §1983 damage remedies available to the taxpayer. See Arg. IV, *infra* at 18-20. Furthermore, since the taxpayer's claim is not premised upon diversity or federal question jurisdiction, but rather upon the civil rights act, the more appropriate analysis is that directed towards cases dealing with §1983 claims.

As we noted in our opening brief (Pet. Br., at 40), the taxpayer's claim that the Illinois statutory system is not plain, speedy and efficient due to the denial of prejudgment interest, necessarily creates the issue of whether or not prejudgment interest on tax refunds is an element of

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footnote continued

ed under Illinois law. Ch. 74, par. 3, Ill. Rev. Stat. 1979. However, *Neubert* is authority for the Fourth Illinois Appellate District only, whereas the taxpayer's property lies in the First District, near Chicago. The Illinois Supreme Court has not had the last word on this issue because the taxpayer in *Neubert* failed to petition the Supreme Court of Illinois for leave to appeal.

* The Amicus, Cook County Legal Assistance Foundation, asserts in sum, "This amicus brief is made to emphasize that the current limited state remedy in Cook County is very cumbersome and is unusable by an individual taxpayer without an attorney knowledgeable in the complex tax review system used only in Cook County." Amicus Br. at 5. Unfortunately, in a county the size of Cook County (the second largest in the country) even despite the best efforts of the Illinois General Assembly and local assessment officials to accommodate the needs of homeowners, "the procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers disputes with tax officials are generally complex and necessarily designed to operate according to established rules . . . If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law." *Perez v. Ledesma*, 401 U.S. 81 at 127 n. 17 (1971).

damages in over-assessment cases. If there is no legal right to prejudgment interest on a refund, then it would be difficult to see the inadequacy of the Illinois statutory remedy. The taxpayer, however, has ignored this basic premise and, rather, has argued cases (Resp. Br., at 19-27) which we have distinguished in our opening Brief. (Pet. Br., at 47-49). Indeed, the taxpayer does this notwithstanding her admission that the Court has not yet decided whether the failure of a state system to award prejudgment interest on a tax refund renders that system inadequate within the meaning of 28 U.S.C. §1341. (Resp. Br. at 19, citing *Department of Employment v. United States*, 385 U.S. 355, 358 (1966).)

In this context the collector cited the majority rule, followed in nineteen state and territorial jurisdictions, which holds that prejudgment interest on state and local tax refunds is not warranted if there is no statutory authorization for such interest. (Pet. Br. at 41-43) It is this majority rule which, we submit, should be considered if the Court should choose to answer the issue specifically left open in the *Department of Employment* case.

The taxpayer also criticizes the collector's reliance on *Boott Cotton Mills v. Lowell*, 159 Mass. 383, 34 N.E. 367 (1893) (no interest on overassessments, but interest on void assessments) and *Brodsky v. Murphy*, 25 N.Y.2d 518, 255 N.E.2d 700 (1969) (no interest on over-assessments, but interest on unconstitutional and void taxes). The taypayer states:

> . . . When the taxing statute involved is wholly void or unconstitutional or the challenged tax has been imposed on exempt property those cases . . . permit interest without statutory authorization. (Resp. Br. at 28.)

However, in Illinois if a tax is void or is levied on exempt property, one is entitled to injunctive relief against

it. See: *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973). Accordingly there is no issue as to prejudgment interest in those situations since equitable relief is available, as in Illinois.

In a like manner, the dicta relied on by the taxpayer in *Proctor & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165 (S.D. N.Y. 1924), *Hopkins v. Southern California Telephone Co.*, 275 U.S. 393 (1928), and *Nutt v. Ellerbe*, 56 F.2d 1058 (E.D. S.C. 1932), is unpersuasive. Those cases were not overassessment cases. Rather, the taxpayers in those cases challenged the authority to levy the entire tax. Under Illinois law, however, equitable relief could issue to enjoin illegal taxes such as those. Accordingly, the cited cases are irrelevant to the case at bar because Illinois provides equitable relief where the tax is unauthorized by law.

Moreover, the collector has a claim of right to the taxes in issue by way of his lien even prior to the issuance of the tax bills.* This lien and claim of right to the tax funds is not affected until the court adjudicates the correctness of the assessment. See *Morton Grove Park Dist. v. American National Bank*, 78 Ill. 2d 353, 364-365, 399 N.E.2d 1295 (1980). Accordingly, since the collector has a claim of right to the tax funds while they are in litigation, there is no due process issue in question. Moreover, the lien or claim of right created by the statute extinguishes, *pro tempore*, the ownership interest upon which the taxpayer must premise the right to interest. Clearly the taxpayer has no interest in prepaid taxes un-

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* Ill. Rev. Stat. 1977, ch. 120, par. 697 provides, "The taxes upon real property . . . shall be a prior and first lien upon such real property, superior to all other liens and encumbrances, from and including the first day of January in the year in which the taxes are levied until the same are paid or until the real property is sold pursuant to this Act. . . ."

til such time as an overassessment is judicially established.

We accordingly conclude that the Illinois statutory remedy which denies prejudgment interest on tax refunds does not render that remedy inadequate within the meaning of §1341.

IV.

THE TAXPAYER HAS FAILED TO DEMONSTRATE THAT AN ILLINOIS §1983 ACTION WOULD NOT PROVIDE A PLAIN, SPEEDY AND EFFICIENT REMEDY FOR HER FEDERAL CLAIMS. (Reply to Taxpayer's Argument IV, Br. at 31-40.)

Introduction

The collector has argued in his opening brief that the ability of the taxpayer to challenge her real estate tax assessment by a §1983 action in the Illinois courts precludes federal jurisdiction. This Court has fully approved the power of the state court to entertain state §1983 actions. *Martinez v. California*, ... U.S. ....., 100 S.Ct. 553 (1980); *Maine v. Thiboutot*, ... U.S. ....., 100 S.Ct. 2502 (1980). The great weight of authority in the state courts is consistent with this holding,* and the

* In addition to those cases set out at 29-30 of the collector's opening brief, the following can be included: Supporting State Jurisdiction of §1983 actions, Alaska-*Tobeluk v. Lind*, 589 P.2d 873 (Alaska 1979); Colorado-*Silverman v. University of Colorado*, 555 P.2d 1155 (Colo. 1976); Connecticut-*Vason v. Cerrano*, 330 A.2d 98 (Conn. Sup. 1974); Indiana-*Reilly v. Robertson*, 360 N.E.2d 171 (Ind. 1977); Missouri-*Shapiro v. Columbia Union National Bank Co.*, 576 S.W.2d 310 (Mo. 1978); New Hampshire-*M.B.C., Inc. v. Engel*, 397 A.2d 636 (N.H. 1979); New Jersey-*Endruss v. Brookdale Community College*, 364 A.2d 1080 (N.J. Super. App. Div. 1976); North Dakota-*Falkenstein v. City of Bismark*, 268 N.W.2d 787 (N.D. 1978); Pennsylvania-*Commonwealth ex rel. Saunders v. Creamer*, 345 A.2d 702 (Pa. 1975); Utah-*Kish v. Wright*, 562 P.2d 625 (Utah 1977); Wyoming-*Board of Trustees v. Holso*, 584 P.2d 1009 (Wyo. 1978).

taxpayer has not attempted to distinguish this obvious trend in civil rights law. Instead the taxpayer has questioned the specific availability of §1983 to reach the case at bar. Premising her argument primarily on *Hillsborough v. Cromwell*, 326 U.S. 620 (1946), the taxpayer contends that (1) the collector's direct precedent is distinguishable; (2) that it is uncertain whether Illinois is "mandated" to accept §1983 tax claims; (3) that it is uncertain whether Illinois will apply federal equity law as against prior decisional law; (4) and that *Trainor v. Hernandez*, 431 U.S. 434 (1977) does not require abstention in the case at bar.

At the outset, it should be clear that if the taxpayer's right to state relief is uncertain, that uncertainty is of her own making. The difficulty surrounding the §1983 question has arisen precisely because the taxpayer has failed to file her §1983 claims in state court. Thus, not having exposed her federal claims under §1983, she can hardly say that Illinois will not hear them. There is no dispositive state precedent against her position, as there was against the taxpayer in *Hillsborough*, where the Court had the benefit of a specific holding by the highest state court on the precise issue necessary for deciding the §1341 issue. Here, as in *28 East Jackson Enterprises v. Rosewell*, 63 Ill. App. 3d 880, 380 N.E.2d 895 (1st Dist. 1978), a taxpayer attempts to take ". . . advantage of an unresolved question of Illinois law, a gray area of Federal-State relations, and the delays inherent in the judicial process to delay the sale of its tax delinquent property until after the following year's taxes have also become delinquent, after which a new suit is filed raising the same precise issues and beginning the process anew." (63 Ill. App. 881-82, 380 N.E.2d at 896).*

* This same pattern appears in the case at bar where the taxpayer has filed an identical suit challenging her 1978 tax-

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The taxpayer asserts that *Lakefront Realty v. Lorenz*, 19 Ill. 2d 415, 167 N.E.2d 236 (1960) and *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973) demonstrate antipathy to her underlying claim for prejudgment interest upon tax refunds. However she has not presented that matter as a §1983 claim despite the fact that Illinois equity law is flexible, see *Hoyne v. Hare*, 60 Ill. 2d 84, 322 N.E.2d 833 (1974), and that the Illinois Supreme Court will not tolerate the taking of property without due process of law. *Morton Grove Park District v. American National Bank*, 78 Ill. 2d 353, 399 N.E.2d 1295 (1980). One might wonder why counsel as obviously resourceful and ingenious as taxpayer's would not present those claims to Illinois courts. The answer is, of course, that a litigation strategy designed to rely on *Hillsborough* "uncertainty" must avoid resolution of developing Illinois law lest the predicate of the argument be destroyed.

The taxpayer urges that the federal district court cases (*Horn*, *Green* and *Advertiser Co.*) cited in the collector's initial brief at 30 are distinguishable because (1) ". . . none of these cases justifies its holding with any detailed analysis of the relationship between §§1341 and 1983. 604 F.2d at 537;" (2) and that other declaratory remedies were available in these cases. What the taxpayer fails to note is that no federal court, save that

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es. *LaSalle Nat. Bk. v. Rosewell*, 79 C 4864. The collector demanded and was accorded a full preliminary injunction hearing on the matter, but, because the case at bar is still unsettled, the district court has continued a temporary injunction generally. Any resemblance between *28 East Jackson* and *LaSalle* is not coincidental since each was represented by the same counsel. The pyramiding of injunctions in *28 East Jackson* and the case at bar appears to be unavoidable as long as taxpayer and collector steadfastly adhere to their respective positions.

whose decision is here under review, has held that a state civil rights action fails to meet the requirements of §1341. Moreover, we have earlier demonstrated that §1341 was impelled to prevent abuse of diversity jurisdiction, not federal question jurisdiction. There is nothing in §1983, particularly after *Martinez* and *Thiboutot* which guarantees litigants a federal forum in tax cases. Even if one were to stop short of such a position, when §1341 is read together with §1983, it seems clear enough that the policy of each statute is forwarded by a state §1983 action. Again, the taxpayer has cited no contrary Illinois precedent.

Similarly, whether or not Illinois must accept jurisdiction of a §1983 tax claim is only a question here because the taxpayer failed to raise it in the state court. It is clear that *Martinez* and *Thiboutot* bind the courts of Illinois under the Supremacy Clause. Even before the decision of those cases, the Illinois Appellate Court in taxpayer's district in *Alberty v. Daniel*, 25 Ill. App. 2d 791, 323 N.E.2d 110 (1st Dist. 1974) ruled that §1983 actions could be brought in Illinois courts. In short, *Hillsborough* requires more than the conjured "uncertainty" of a taxpayer who has deliberately withheld her claims from the state court.

The taxpayer also maintains that there is doubt or uncertainty whether the courts of Illinois will apply federal equity law in §1983 cases. The taxpayer hypothesizes that the Illinois courts may not "feel bound" by such federal principles. Having said as much, the taxpayer raises no precedent to support this baseless affront to the judiciary of a state whose courts possess a heritage of respect for the constitution and laws of the United States.

In *People ex rel. Korzen v. Fulton Market Cold Storage Company*, 62 Ill. 2d 443, 343 N.E.2d 450 (1976), cited by

the taxpayer as an example of Illinois courts' reticence to apply appropriate federal law, no question of the relationship between state exhaustion requirements and §1983 claims was presented because the appellate court decision there under review was premised solely on state grounds. Similarly, in *28 East Jackson Enterprises, Inc. v. Rosewell*, 65 Ill. 2d 420, 358 N.E.2d 1139 (1976) the taxpayer refused to present its federal claims to the Illinois courts for determination. Far from demonstrating "antipathy . . . to the imposition of federal jurisprudence upon it. . . .", that case stands as a rejection of a taxpayer's facile attempt to manipulate federal and state courts in a manner which threatened to bring embarrassment to both. It is precisely at this point, where "the role of the Illinois judicial system closely resembles that of a master in chancery for the federal district court" (65 Ill. 2d at 425), that vital considerations of federalism, comity and equitable restraint are implicated.

Finally, the taxpayer's attempt to rebut the collector's *Younger-Trainor* analysis is very seriously flawed. In her *Younger* analysis, the taxpayer states, "*Younger* abstention has no place where, as here, the federal constitutionality of a state law is not under attack." (Br. at 37). However, as we have demonstrated in Argument II heretofore, a claim of tax discrimination under *Snowden* must assert that the state, in effect, has passed an unconstitutional classification law by its purposeful and intentional assessment action, ". . . so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by statute." *Snowden v. Hughes*, 321 U.S. 1, 9 (1944). Therefore, if the taxpayer's complaint does state a cognizable claim of tax discrimination, then it surely presents a *Younger* challenge.

Proceeding with her *Younger* analysis, the taxpayer maintains that ". . . no unsettled questions of state law are involved . . .", citing the *Lakefront* and *Clarendon* holdings on the question whether Illinois tax refund statute's failure to authorize prejudgment interest renders it an inadequate remedy. This position has been treated in Argument III hereinbefore, and is a separate question. The taxpayer has subtly shifted her focus from the §1983 remedy onto the statutory remedy. But the real question here is whether comity requires that Illinois courts be permitted to determine the scope of a state §1983 action. That question is undecided by Illinois courts because the taxpayer has chosen instead to litigate in federal court. The collector submits that it is more sensible to allow the state courts the necessary freedom to shape a relatively new state court tax remedy under §1983, than to run the risk of turning even the highest court of Illinois into a master in chancery for a district court judge.

Third, the taxpayer maintains that ". . . there is no prior pending state suit . . ." (Br. at 38) with which a federal injunction will interfere. This argument fundamentally misapprehends the importance of the tax sale proceedings authorized by state statute. Moreover, it seems clear enough from the pleadings (A. 10) that interference with the proposed sale is precisely what the taxpayer seeks to achieve by her federal injunctive suit.*

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* The taxpayer confuses *Younger* abstention with *Pullman* abstention when she argues that she should be permitted to return to federal court ". . . in the event the Illinois courts decline to grant adequate relief." Br. at 38 n. 36. The cases she cites there (*England, Sachs,* and *Mr. Boston*) deal with the question of presentation of separate state and federal claims. §1341 requires the taxpayer to present all her claims in the state court. The Seventh Circuit has held that an "England"

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It is plain that the taxpayer's suit would subvert a fundamental state objective within the meaning of *Trainor v. Hernandez*, particularly if injunctions were freely granted upon the basis established by the court below.

In a similar vein, though in a different section of her brief, the taxpayer argues that she contests only the ". . . discriminatory portion of her tax bill. . . .", and "the flow of lawful revenue represented by the proper portion of the tax would continue uninterrupted." Br. at 25 n. 20. This contention begs the question, because it is for the courts, not the taxpayer, to decide whether the allegations of a complaint, assuming a claim is stated, warrant relief, and to decide how much of the tax payment, if any, should be refunded.

The taxpayer argues that "The Tax Injunction Act subsumes the policy concerns behind the *Younger* decision, *Id.* at 444 n. 8, so that a demonstration that the Illinois remedy is not plain, speedy and efficient for purposes of §1341 suffices to establish the inapplicability of *Younger*," Br. at 39. This position conflicts with the legislative intent of the tax injunction act which sought to prevent out-of-state corporations from tying up state taxes in federal courts when ". . . no federal question [is] involved . . . " [81 Cong. Rec. 1417 (1937), Remarks of Senator Bone, a co-sponsor of the bill.] Where the extension of federal jurisdiction, like §1983, comes into conflict with important state court proceedings, the broader concerns of comity and equitable restraint set out in *Younger* and *Trainor* come into

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reservation is not possible in a §1341 tax case. *28 East Jackson Enterprises v. Cullerton*, 551 F.2d 1093 (7th Cir. 1977) *cert. denied*, 434 U.S. 835.

play. Moreover, as the Court pointed out in *Trainor*, 431 U.S. 434, 441 (1977) the question is not only whether available remedies at law in federal court would bar injunctive relief, but also whether there are remedies available in the pending state proceeding. However, in Illinois tax cases where the statutory remedy is, as here, available to the taxpayer because she claims "to be able financially to pay the tax and sue for a refund . . ." (A. 9), the taxpayer cannot suffer loss of the property. While the taxpayer may suffer ". . . substantial loss, expense and burden," that sort of monetary injury is remediable by the federal §1983 damage remedy recognized by the Seventh Circuit in *Fulton Market Cold Storage Co. v. Korzen*, 528 F.2d 1071 (7th Cir. 1978), *cert. denied* 439 U.S. 1121 (1979). This Court has held that monetary injury (here primarily prejudgment interest claimed by the taxpayer) which is compensable in a damage action, is not irreparable injury sufficient to support an injunction. *Sampson v. Murray*, 415 U.S. 61, 88-92 (1974).

In final summary, if the history of real estate tax litigation in Illinois is any guide, then the Court can assume that taxpayers will exploit fully the opportunity for delay and confusion offered by anticipatory litigation of state tax valuations. See *People ex rel. Sweitzer v. Orrington Co.*, 360 Ill. 289, 293, 195 N.E. 642 (1935); *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 106, 306 N.E.2d 299, 302; *28 East Jackson Enterprises v. Rosewell*, 63 Ill. App. 3d 880, 881-82, 380 N.E.2d 895, 896 (1st Dist. 1978). Moreover, if allegations as vague as those set out in the complaint are sufficient to state a claim (contrary to the collector's position, Argument II, supra), then any taxpayer harboring a valuation dispute against the assessor may file an injunction claim in federal court with the hope that the threatened delay may prove a valuable bargaining chip in settlement discussions with county tax officials. For this very reason the

Clarendon court limited injunctive relief in real estate tax valuation cases to those in which a traditional equitable ground was combined with unavailability of the statutory remedy. The collector suggests that the §1983 civil rights damage remedy recognized by the Seventh Circuit in *Fulton Market* (and, therefore, applicable in a state court §1983 action by virtue of the Supremacy Clause) provides the federal analog to the Illinois remedy in cases where injunctive relief is sought in federal court. Where, as here, the federal damage remedy is available to the taxpayer, and where the taxpayer has the ability to pay the tax, then federal injunctive relief should be denied on the authority of *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) and *Trainor v. Hernandez*, 431 U.S. 434 (1977).

CONCLUSION

For the foregoing reasons, the collector respectfully submits that the opinion and judgment of the Court of Appeals should be reversed, and the order of the District Court affirmed.

Respectfully submitted,

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No. 79-1157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT BY COOK COUNTY LEGAL ASSISTANCE FOUNDATION ex rel. FRED SCHUBERT

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT BY COOK COUNTY LEGAL ASSISTANCE FOUNDATION ex rel. FRED SCHUBERT

The applicant, COOK COUNTY LEGAL ASSISTANCE FOUNDATION, INC., *ex rel.* Fred Schubert, respectfully requests leave to file the accompanying amicus curiae brief. The applicant is a not-for-profit corporation delivering free legal services to low income residents of Cook County. Fred Schubert is an elderly client who as a real property owner received assistance from the Foundation in receiving a refund of excess taxes paid to the petitioner Edward J. Rosewell.

Applicant is in support of the respondent's position. Applicant further points out that neither party has set forth in detail the step-by-step procedure for trying to get real estate tax relief in Cook County. Further neither party has set out the facts or law putting forth the interests of low income single family taxpayers in Cook County.

Such facts and law while not having been presented by either party are vital to low income property owners. Further such facts are very relevant to the main issue of the speed and efficiency of the current limited remedy now available to taxpayers in Cook County, Illinois. The fairness of real estate taxes to those on fixed incomes directly affects their property rights to their most precious possession.

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In The

Supreme Court of the United States

October Term, 1979

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Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT BY COOK COUNTY LEGAL ASSISTANCE FOUNDATION ex rel. FRED SCHUBERT

I.

ISSUE PRESENTED

Are remedies that may be had by real estate taxpayer in courts of Illinois, who reside in Cook County, including state civil rights action premised on 42 U.S.C. §1341, or statutory refund without interest, "plain, speedy and efficient" within meaning of 28 U.S.C. §1341 so as to bar federal injunctive relief from alleged overassessment that is claimed to violate taxpayer's civil rights?

II.

INTEREST OF THE AMICUS PARTY

This brief is submitted in support of the arguments of the taxpayer plaintiff, LaSalle National Bank, and the ruling below. Cook County Legal Assistance Foundation, Inc. is a not-for-profit corporation engaged in the delivery of free legal services to low income residents of Cook County, Illinois. Through its efforts to serve the elderly, the Foundation's Senior Citizens Project staff attorneys represented various owners of real estate in Cook County in efforts to correct overassessments by the Cook County Assessor.

Fred Schubert is an elderly client of the Foundation who litigated the issue of overvaluation and won judgment for a refund of his excessive 1977 property taxes. Mr. Schubert's experience illustrates that the remedies available to a Cook County taxpayer in Illinois courts are anything but "plain, speedy, and efficient." The taxpayer must follow a precise, but tortuous, path just to get to the Illinois court where, if he proves fraud, he will, at some point, get a refund without interest, court costs, or attorney's fees.

Indeed, the current remedy is long, costly, complicated and practically unavailable to an individual taxpayer. Such a system is especially unfair to homeowners on low or fixed incomes unable to secure legal help. Even with legal assistance, the system is arbitrary to the extreme with a virtual void of procedural or due process protections as is explicitly pointed out in "Review of Real Estate Assessments—Cook County v. Remainder of Illinois," 11 *John Marshall Journ. of Practice and Procedure*, 17 (Fall, 1977).

III.

SUMMARY OF ARGUMENT

An owner of real property in Cook County, alone among all other property owners in Illinois, can not seek Administrative Review in the Illinois courts after an administrative denial. The taxpayer must wait and pay the whole excessive tax under protest on a specific form. The taxpayer, to even get to court, then must file specific legal objections within 10 days of a one day notice in a newspaper. Then, after a long court proceeding in which the burden is on the taxpayer, he may get a refund of his excessive taxes without court costs, interests, or attorneys' fees. This is not a plain, speedy and efficient remedy nor should it bar a plaintiff from federal court where there are possible civil rights violations. Such a complex, expensive system is especially unfair to low income and elderly homeowners who pay excessive real estate taxes in Cook County.

IV.

ARGUMENT

A. STATEMENT OF THE CASE OF FRED SCHUBERT.

Fred Schubert, an owner of real property in Cook County, had in 1975 and 1976 appealed to the Cook County Assessor and Board of Appeals for a reduction in his property valuation. He claimed his property was overassessed. In every instance, the County denied his complaint and refused to alter his assessment. The same

complaint was filed on August 11, 1978 with the Cook County Assessor and December 7, 1978 with the Board of Appeals of Cook County in regard to his 1977 tax assessment. These appeals were also denied. In every other county in Illinois, such a taxpayer could have filed an administrative review to the Circuit Court by complaint within 35 days of exhausting the administrative remedies. Unfortunately, only in Cook County is there no immediate judicial review of the administrative decisions available. *White v. Board of Appeals*, 45 Ill.2d 378 (1970). Nor did a petition for a writ of certiorari in the Circuit Court filed on behalf of Mr. Schubert to challenge the administrative decision get a speedy decision as the Circuit Court of Cook County directed the proper remedy was to pay under protest. *Schubert v. Board of Appeals*, (Cir.Ct. of Cook County, Law Division), 78 L 5053 (Sept. 6, 1978).

Therefore, on July 27, 1978, Mr. Schubert paid his taxes in full under protest using the requisite form as is the Illinois statutory remedy at *Ill.Rev.Stat.*, Ch. 120, §§675, 716. Mr. Schubert successfully filed his objection on December 7, 1978, during the statutory 10 day period when objections may be filed. This crucial 10 day period is commenced by one notice in a township paper which had to be scrupulously read by Schubert's attorneys as the required next step for judicial relief. There is no mechanism to get any advance notice as the County sends no notice nor can a taxpayer find out by calling or writing the County.

After all the above prerequisites, Mr. Schubert, after many delays, won a judgment in Cook County, Case 77 Co 172, for a refund of $310.39 out of the $1,253.76 taxes paid for the year 1977. The court found an overassessment of 25%. The County also admitted during the

proceedings in a Request to Admit the lack of notice and lack of any reasons given to taxpayers denied at the administrative level. This judgment will not affect his 1978, 1979, or 1980 taxes and the taxpayer will have to start over each year. A check was issued by the County to Mr. Schubert on March 27, 1980, with no pre- or post-judgment interest, nor costs, nor attorneys' fees. If a taxpayer is late or misses one step (i.e. Board of Appeals, pay tax in full with correct form, find out 10 day objection deadline, file correct objections, overcome burden of proof, win judgment, prepare and get approved judgment order), he will not even get a refund on his own money. *County Treasurer, etc. v. Chicago Title, etc.*, 65 Ill.App.3d 307 (1978).

B. ARGUMENT IN SUPPORT OF RULING IN *LA SALLE NATIONAL BANK v. ROSEWELL*, 604 F.2d 530.

The plaintiff-taxpayer in the case at bar has ably argued in the Seventh Circuit Court of Appeals why the lack of interest combined with the lack of a plain, speedy, and efficient remedy necessitates federal jurisdiction. This amicus brief is made to emphasize that the current limited state remedy in Cook County is very cumbersome and is unusable by an individual taxpayer without an attorney knowledgable in the complex tax review system used only in Cook County. Not only is direct administrative review unavailable in Cook County, but only in Cook County must the taxpayer always show the valuation has been fraudulently made rather than simply erroneous. *People ex rel. Frantz v. M.D.B.K.W.*, 36 Ill.2d 209 (1966). An Illinois court will only review a valuation where the taxpayer can show actual or constructive fraud by the assessing official. *Clarendon Associates v. Korzen*, 56 Ill.2d 101 (1974).

There is no other method available to a taxpayer in Cook County, Illinois except the process outlined above which is long, complex, deficient in due process and places the whole burden on the taxpayer. Also, the taxpayer gets no prospective relief and must each year pay in advance the full amount of questionable tax. Taxpayers can not get injunctive relief, *Chicago Sheraton v. Zabin*, 71 Ill.2d 85 (1978); nor declaratory relief, *Good Year Tire and Rubber Co. v. Tierney*, 411 Ill. 421 (1952).

The individual taxpayer, after going through arbitrary administrative procedures, must pay his full tax under strict statutory requirements. Then, the taxpayer, if he is especially vigilant, must find a one day notice and file the proper legal documents with court costs within 10 days of that publication. Then, after a delay which is often more than two years, the taxpayer must obtain a judgment through settlement or by proving some form of fraud.

The taxpayer can not receive any interest on his excess payment regardless of the delay in refunding the excess or how many times he must go through this procedure. *Clarendon Associates v. Korzen*, 56 Ill.2d 101 (1974). In addition, the taxpayer must pay all his own court costs. Nor is there any provision for attorneys' fees.

Fundamental fairness requires and common sense suggests that the state either have a plain, speedy and efficient remedy or provide interest for the long time period for refunded excess taxes. As the Court of Appeals noted in quoting from the legislative history of 28 U.S.C. §1341, an action for injunctive relief in a federal district court "will not be withdrawn except where there is a plain, speedy and efficient remedy at law or in equity in the courts of the state." *LaSalle*

National Bank v. Rosewell, 604 F.2d 530, 532. No such remedy exists today to protect a Cook County taxpayer. Such a situation is especially onerous to the elderly on fixed incomes who may lose their most precious possession because of today's rising taxes with the lack of any plain method to challenge overassessments. No party has even suggested that 28 U.S.C. §1341 was intended to bar all federal court jurisdiction.

V.

CONCLUSION

The amicus respectfully requests that this Honorable Court affirm the decision of the Court of Appeals in that Cook County now has no plain, speedy, efficient remedy which would raise the bar of 28 U.S.C. §1341 to the complaint of the taxpayer seeking relief from alleged discriminatory assessment practices practiced year after year by the County of Cook.

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